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Supreme Court of the United States
October Term, 1978

No. 77-1578

BROADCAST MUSIC, INC., *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

No. 77-1583

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, *et al.*,
Petitioners,

v.

COLUMBIA BROADCASTING SYSTEM, INC.,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ADDENDA A-E TO BRIEF FOR RESPONDENT

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ADDENDUM A

Publisher and Writer Hostility to Licensing Other Than Through ASCAP

1. The Findings of the Courts Below

The district court made the following findings regarding the attitudes of publishers and writers with respect to the direct-licensing possibility and the reasons supporting that attitude:

> "It is true, as CBS relentlessly emphasizes, that most of the writer and publisher witnesses who testified, by deposition or at trial, expressed a strong preference for the blanket licensing system. The preference is no surprise in view of the fact that the blanket license is the only way in which performance rights have been marketed to television networks for nearly thirty years. Moreover, the writer-publisher testimony establishes that, from their standpoint, the system is trouble-free and self-executing and the financial rewards are satisfactory. None of them expressed the wish to exchange their present, relatively uncomplicated way of doing business for what they viewed as a new mode involving unfamiliar procedures and possible financial uncertainty." Pet. App. 83a.
>
> "We may agree that the cited testimony proves that writers and publishers prefer the present system and are apprehensive of dealing directly with CBS. . . ."* Pet. App. 84a.

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*In the next sentence, the court stated,

"However, this by no means proves the obverse: that copyright owners would refuse to deal with CBS if it discontinued its blanket license and insisted upon dealing on a direct licensing basis. . . ." *(footnote continued on next page)*

While those findings are adequate in law to establish the propositions for which the evidence was adduced (*see* Points I. D. 2., III. B., IV. A., V., VI. and VIII. of our brief), they nevertheless understate the record to a marked and significant extent.

In view of the court of appeals' rulings of law on each of those points, it was unnecessary for it to consider the extent to which the vehemence of defendants' admitted antipathy to price competition exceeded the district court's moderated description. But the magnitude of that difference is so plain on the face of the testimony as to reinforce each of those points many times.

2. The Evidence

As to the extent of the resistance itself (which the district court did not assess and attributed to only a "strong preference"), perhaps the most striking testimony consisted of the publishers' assertions that they would not deal with CBS or solicit it for performance rights business in the event it terminated its ASCAP license (or, as the questions were alternatively stated, if all networks canceled their ASCAP licenses or ASCAP were enjoined from licensing networks). Whether such testimony proves that they would not in fact deal, or would boycott CBS, is beside the point; it certainly demonstrated a more intense basis

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The "obverse" is not a proposition which was called into question in this case; and thus that holding is irrelevant, as is discussed more extensively in Points I and III of our brief. Nevertheless, the sentence is quoted here because it seems to indicate, contrasted with the sentence quoted above in text, that the phrase "we may agree" was intended to mean "we do agree" rather than "we might or might not agree". In either event, however, as is shown below, the evidence clearly proves more than the mere "preference" and "apprehension" referred to.

for resistance to direct licensing than a mere "preference" for the present system. For example:

> *Mr. Vogel* (President, Jerry Vogel Music Co., Inc., proprietor of one of the most important catalogs in the industry, PX 883):
>
> "Q. Suppose on January 1st of next year, 1973, CBS cancelled its ASCAP license so that it could acquire no rights to music through ASCAP, and that the other two networks, ABC and NBC, kept their ASCAP licenses so they were continuing to license through ASCAP; would you make more effort under those circumstances than you do now to solicit either the television network or the producers of its programs to use your music?
>
> "A. On what stations?
>
> "Q. On the CBS network, which would include—
>
> "A. No, I would take them off the mailing list. You say you have no ASCAP license?
>
> "Q. We have no ASCAP license.
>
> "A. So I have to take you off the mailing list.
>
> "Q. You would do that because they had no ASCAP license?
>
> "A. That's right. But I hope it don't happen.
>
> "Q. Would you make any effort to license them directly?
>
> "A. No.
>
> "Q. No, you would not. Can you tell me briefly why not?
>
> "A. I am a member of ASCAP." (D 913-14)

"Q. Suppose CBS cancelled its license today and tomorrow the producer called you?

"A. I couldn't answer that. I don't think—I would have to stick with ASCAP. I think most of the people would have to stick to ASCAP.

"Q. Why is that?

"A. Well, we know what we got, and we don't know what we are going to get." (D 915)

"Q. . . . . Would you be willing to at least attempt to negotiate that kind of arrangement?

"A. I don't think so.

". . . .

"Q. But if CBS had cancelled its license presumably they wouldn't use any works in the ASCAP repertory unless they got the rights from the publisher or the writer.

"A. Well, we got the other two networks." (D 916)

"Q. Suppose that ten of the leading publishing companies in New York started licensing CBS directly, CBS producers directly, would you then be more inclined to start talking to producers of those programs if they called you up?

"A. No, ten publishers. I don't think so, no." (D 929)

Mr. Morris (President of the Edwin H. Morris & Co., a named defendant, and Board member of ASCAP):

"Q. Let us assume the broadcasters all cancelled their ASCAP licenses [today] and they refused to deal with ASCAP.

". . . .

"You would be in a position where you weren't getting any performance rights royalties because they weren't using your music and if you were successful in getting broadcasters to take direct licenses to your music, you would be getting some revenues. Why wouldn't you try to get them to take direct licenses?

"A. I don't believe that would be the direction I would be inclined to go.

"Q. Why not?

"A. Simply because I believe that the organization of ASCAP best represents the interests of the writer and myself." (D 656-60)

"Q. If you wanted to get a higher price for your music from CBS, how would you go about doing it?

"A. I have no intention of ever going in that direction. I am completely satisfied with what ASCAP remits to me from the various sources." (D 752-53)

Mr. Goodman (Officer and part owner of Jewel Music Publishing Co.):

"Q. Do you believe that once ASCAP has undertaken to offer licenses to a category of users that the members should refrain from dealing with those users?

"A. I do." (Tr. 1632)

As to the reasons for that antipathy, those and other publishers evinced, not merely the recognition noted by the district court (that present "financial rewards are satisfactory" and price competition portends "financial uncer-

tainty"), but an acute perception of the monopoly power that enables those "rewards" and so extreme a fear of price competition as to exceed even that warranted by the economic facts. Thus:

> *Mr. Brettler* (Executive Vice President of defendant Shapiro, Bernstein & Co., Inc.; ASCAP officer; and Board member of ASCAP, NMPA and The Harry Fox Agency, Inc.):
>
> ". . . I personally have the feeling that direct licensing of television networks would be . . . self-annihilation as an industry. . . ." (D 353)
>
> "In unity there is strength and in disunity there is weakness. The unity of ASCAP which is basically a legal monopoly, we have more strength in combining this negotiation, throwing all our copyrights together into a vast pool of music that makes it very attractive to a user to deal with ASCAP. We don't have to face the problem of all of us individually dealing with a user or a producer. . . ." (D 201)

Mr. Morris:

> "Q. . . . . Let us say that the price that CBS is willing to pay you is the same price in effect you are now getting from ASCAP in distributions when CBS uses your music?
>
> "A. No, I consider there is a moral obligation here to the writers with whom I am in partnership with and I couldn't possibly entertain anything of that kind.
>
> "Q. The money would be the same. I am having difficulty understanding that.

> "A. The very structure of what I believe would no longer, to me, exist, so I can't see that.
>
> "Q. I guess what I am really asking you, Mr. Morris, is, what is the structure of what you believe?
>
> "A. I believe in ASCAP because of my experiences over the years and it seems to be the only practical way for all elements to do business.
>
> "Q. So you would approach any negotiations with a broadcaster or a network like CBS with a great hesitancy to enter into a direct licensing transaction?
>
> "A. I believe that would be the end of the road for me as a publisher." (D 661-62)
>
> "Q. You believe that . . . ASCAP's performance of the licensing functions as ASCAP now performs that function is in the best interest of music publishers in general and the Edwin H. Morris Company in particular?
>
> "A. I do." (D 679)
>
> "Q. So that for music publishers to engage in the direct licensing would worsen their position?
>
> ". . . .
>
> "A. My business judgment is it would be disastrous for me." (D 681-82)
>
> "Q. In other words, your bargaining position as an individual is less than your bargaining position as part of ASCAP?
>
> "A. I would say yes.
>
> "Q. ASCAP has a superior bargaining position than anyone or group of its publishers?
>
> "A. You have answered it.
>
> "Q. That is true?
>
> "A. It is true." (D 719-20)

Mr. Goodman:

"Q. Do you believe that it's wrong for ASCAP members to compete with ASCAP for the licensing of performance rights?

"A. Yes.

"Q. Why?

"A. Because I think as individuals we have no strength.

"Q. Then you believe it's important as a publisher to combine with other publishers and have a common licensing agent?

"A. No doubt in my mind.

"Q. Do you believe that when individual publishers enter into direct licenses with users which bypasses ASCAP that that weakens the strength of ASCAP?

"A. No. doubt." (Tr. 1631-32)

Mr. Vogel:

"I have the writers. I just can't spoil the writers' living either, can I?

"Q. Would it spoil the writer's living for CBS to deal with you—

"A. I think so." (D 932-33)

"Q. Do you think that the price of music would go down, the revenues of your company would go down if CBS started dealing directly with publishers?

"A. Oh, sure.

". . . .

"Q. Would this be at all because you were doing the negotiating instead of ASCAP?

"A. I think so." (D 933-34)

Mr. Brackman (General Manager of defendant Essex Music, Inc., one of the group of companies known collectively as "The Richmond Organization" or "TRO"):

"Q. Do you think that such a development [a CBS bypass attempt] would be good for your company?

[Objection omitted]

"A. I don't know. I would be very suspect if a company came to me directly.

"Q. Can you tell me why you would be suspect of the company which came to you directly?

"A. Every time a user comes to you directly you wind up getting less than you started out with, particularly when they are a big conglomerate.

"Q. You mean less for the performance rights than you were getting before?

"A. Whether it is performances, or mechanical, or any other form of revenue." (D 110)

It should be noted that the depositions of Messrs. Brettler, Morris, Vogel and Goodman were taken before ASCAP moved to terminate all depositions on the ground that those previously conducted had been "aimless," "ineffective" and "improper" (ASCAP's Memorandum in Support of Motion For Protective Order, September 20, 1972, p. 1)—a motion which required extensive briefing and disclosures as to how singularly effective those depositions had been. Thereafter, ASCAP witnesses were noticeably more guarded in their expression of these points. But even the witnesses subsequently deposed, as well as the writers and publishers whom ASCAP itself called to testify at the trial, could not entirely mask the strength of their feelings for the continuation of the present system

and the "regret" with which they would view any change (*Washington*: "It is a perfect world," D 969, and a direct licensing system "would be a very upsetting thing for me personally" and "an economic hurt to me as well," D 947; *Chiantia*: "I am perfectly happy with the system we have now," Tr. 2919; *Coleman*: "we are perfectly content with ASCAP," D 334; *Broido*: "would regret" the change because the present system is "probably the best one that has been devised" and would thus "hope" that, in the event of a bypass "CBS would return to the ASCAP system," Tr. 3492, 3500-01; *Copland*: would be "rather regretful" about change because the present system is "a comfortable arrangement," Tr. 3486; *Green*: the present system is "effective," "convenient" and "good," Tr. 3473-74; *Shulman*: direct licensing would be "bad" for his company, and impose a "huge burden" and represent a "radical departure" from the "business environment that I have functioned in" and, in the event of a bypass, he "would hope" that CBS "would see the light and go back to ASCAP and continue under the blanket license system," Tr. 3132-34).

Moreover, there are at least two other factors underlying this antipathy to direct licensing, neither of which were referred to in the district court's opinion, but both of which were proven without question.

First, the publishers' own resistance to licensing directly would be buttressed substantially by the attitudes of their writers, who share the publishers' economic incentives and have additional interests at stake. Distributions to the major writers are based on a four-fund plan of deferred compensation, the advantages of which would be considerably lessened if the principal licensee group (television networks) were to succeed in channeling a substantial portion of those funds into a competitive system. (Writers under the four-

fund plan have, as a result of past performances, accumulated claims on ASCAP's current revenues. If those revenues decline sharply, so does the value of such claims.) Moreover, writers in general rely on the present ASCAP system as a means of preventing publishers' licensing of performance rights without writers' consent—an objective so strong as to form the root cause of the historical conflict between writers and publishers in other fields, but make writers quite avid in their agreement with publishers in this one. [Fisher Tr. 1687-90, 1694-1706, 1736-37, 4824; Nathan Tr. 3905, 3909-10, 3965-67; E 139, 448, 458, 480, 622, 831, 849; Lane Tr. 992, 1010-11, 1024-25, 1109-12, 1149; Marks Tr. 2675-78; Chiantia Tr. 2976; Green Tr. 3464, 3467, 3469-70, 3473-74; Chiantia D 321-22; Coleman D 337-38, 345-46; Fagan D 453-56; Morris D 645-49, 661, 731, 741-43; Washington D 941-43, 947, 961-62, 969, 974-77, 984-89; Vogel D 932-33]

Thus, as to the one occasion, more than three decades ago, in which a major publisher, Warner Brothers, attempted to split off from ASCAP and commence the licensing of broadcasters on its own, Mr. Morris, who was then operating head of the Warner Brothers music publishing companies, still recalls the "rather violent" (D 648) reactions of writers and believes that the "lesson" (D 680) of that experience would be applicable today to a network bypass attempt:

> "Q. Did you object to Warner Brothers removing its repertoire from ASCAP?
>
> "A. Yes.
>
> "Q. Do you remember the grounds on which you made that objection?
>
> "A. I could see nothing but alienation of all the writers. At that time Warner had the most

foremost names in the music world, Hammerstein, Rodgers & Hart, Vincent Youmans, Kern, Harbach, all of them, Cole Porter.

"At the end, I could only say this, at the end of this period, virtually all of these writers who had had contracts, some were about to expire, left. Those with contractual obligations continued until their terms expired.

". . . .

"Q. Did you talk to any of the writers during this period about the Warner Brothers withdrawal of its repertoire from ASCAP?

"A. Yes. At the direction of Herman Starr we had some meetings with some of the composers in an attempt to placate, show them what the objective was.

"My only function then was to introduce Starr to these people and be an observer. He presented the arguments.

"Q. What was the reaction of the writers to the Warner Brothers withdrawal?

"A. Completely antagonistic, in every area. Even those writers I have not mentioned that were currently employed by Warner through me on the coast in the motion picture division were rather violent.

"Q. Do you remember any specific points they made?

"A. There were a number of pictures in production and there was no way of exploiting these pictures other than through the medium that broadcasting offered. In those days the record business was practically nonexistent from the standpoint of

reaching the public. So, your one medium that really had impact was through exploitation. So, the writers were very bitter. Cole Porter in particular with a show called Jubilee which opened in Boston at that time and had one very famous composition which later became Begin the Beguine, was highly incensed.

". . . .

"Q. Was there any expression by the writers as to the loyalty to ASCAP?

"A. Yes.

"Q. And the move by Warners was really an act of disloyalty.

"A. Yes." (D 646-49)

"Q. Based on your experience, particularly the Warner Bros. experience, the Warner Bros. withdrawal of its catalog from ASCAP, do you think there is a good chance that writers might have some adverse reaction to this possibility [the direct licensing of CBS]?

"A. I believe so." (D 731)

ASCAP's economic expert witness, Mr. Nathan, on questioning by the court, also testified:

> "THE COURT: . . . Don't you think it is reasonable to assume that the writer does believe that it is an advantage to be a member of ASCAP because he doesn't have to compete for the price?
>
> "THE WITNESS: I suspect, your Honor, that is true. . . ." (Tr. 3909)

Secondly, this resistance factor—and the premium that would have to be paid to overcome it—is strengthened still further by the fear that direct licensing of one customer (*e.g.*, CBS) would proliferate (*e.g.*, lead to the

direct licensing of other television networks and possibly other users as well), and the clear recognition by each major publisher and writer of how important his own resistance is to preserving the present system against just such a proliferation.

Publishers who annually supply the preponderance of television network needs are a highly concentrated group. The top 14 alone furnish approximately 45% of CBS's requirements (measured by ASCAP credits); they annually receive 60% of ASCAP's total publisher distributions; and television network performances account for 40% of their ASCAP receipts. Each such publisher has a particularly strong vested interest in preserving the present system against change; each knows the importance that his assistance to a bypass would have to its success; and each knows that each other major publisher has the same strong economic incentives against allowing that change to occur. [PX's 94, 416; Fisher Tr. 1699-1700, 4800-01; Nathan Tr. 4114-16; Goodman Tr. 1631-32; Brettler D 235; Chiantia D 280; Morris D 719-20; Vogel D 915, 929]

The writers' concentration is effectively achieved by membership in AGAC. During the periods covered by the ASCAP music study 42 to 46% of all ASCAP compositions performed on CBS programs were written by AGAC members (PX 843; AX's 159, 287). In the first quarter of 1972 alone, to license the published AGAC music would have required securing more than 1,200 consents from such writers (PX's 429, 461, 842; AX's 160(a)-(q)). AGAC's views on the subject of direct licensing were graphically displayed in the 3M incident reviewed in Addendum B. But the reasons for resistance could not have been expressed any more strongly than in the speech given by ASCAP's President, Stanley Adams, to the AGAC membership on that subject:

> "There can be nothing as important as presenting a solid front across the negotiating table. If we dissipate our energies fighting among ourselves, we will have exhausted the ammunition we need in the battles ahead.
>
> "the beginner and the veteran, the big writer and the small one, the rock 'n' roll, the ballad, the novelty, the popular and the production writer all nestled together under one umbrella—an umbrella that will cover us just as long as we collectively hold it up and not one second longer.
>
> "So that when someone thinks he is getting an addition by making a little deal on the side that sabotages our basic contract, he is really sabotaging himself—he is making a little hole in the fabric of the umbrella. Every hole causes a leak, enough leaks and the rain pours in and I have never met any person who can walk in the rain without getting wet." (E 454-55)

Although Mr. Adams' specific reference in the concluding paragraph was to the "basic" AGAC contract (which AGAC writer members sign with music publishing corporations), he left no doubt in that address that the writers' most important organization, ASCAP itself, had the same purpose of "presenting a solid front" and the same vulnerability to leaks "in the fabric of the umbrella":

> "[L]eft to our own devices we have attempted to get together to protect and foster the inherent rights that we all possess. These devices have taken the form of organizations—all bearing different labels to define a particular segment of creative endeavor. But, whatever the label, they all have a single purpose.

"To resist the splitting of our ranks so that we can be picked off one by one." (E 449-50)

Likewise, Mr. Brettler admitted his concern that his direct licensing of 3M "might set some precedents that I would be sorry about"—specifically:

"Q. Precedents for what? That is, that you might be sorry about.

"A. We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony." (D 235)

Mr. Chiantia testified that, before he would consider dealing directly with CBS, he

"would have to know how I could exist beyond that time having to license CBS directly, and I would have to know what other possibilities were involved, what other doors would be opened. Would I then start licensing roller skating rinks directly? Would I then start licensing nightclubs directly? Would I then start licensing Joe's Hot Dog Stand directly? Where would it end? I'd have to know all of that in front. . . ." (D 280)

And as noted by Albert Berman, managing director of the Harry Fox Agency, "in this particular field you have the herd instinct, of course" (Tr. 951-52).

The same resistance factors were evident from the reaction of writer and publisher Board members to CBS's

effort, by the institution of this suit, to initiate a per-use licensing system. Although such a system has not previously existed in this market, per-use licensing is hardly a novel concept to the publishing industry (Brettler D 147-49, 252), and publishers and writers are clearly aware of what that system portends in terms of price competition, as the evidence reviewed below shows. Not the slightest consideration, therefore, was given by the ASCAP Board to the possibility of exploring the development of such a system on a voluntary basis. Mr. Brettler testified that, prior to the commencement of the action, "we were aware that CBS was *threatening* at the time to go in another direction" (D 251). According to ASCAP's President, Mr. Adams:

"Q. Was there any discussion as to why you should defend the suit?

"A. I guess when you are going to think somebody is going to put a match to your house you generally get a hose to put out the fire.

"Q. Was the CBS complaint viewed by you as putting a match to your house?

"A. It's possible. Any match is liable to burn down a house." (D 7-8)

Another Board member, Mr. Washington, in testifying about his discussions with other writers concerning the suit, testified that "I would try to calm them and say 'Don't worry, we have had these things come up during the years' " and "I try to keep them from pushing the panic button" (Dep. 132-33). As to Mr. Washington's own "point of view based upon my 45 years as a writer,"

". . . it would not be a comfortable thing, I'll say, for me.

> "Q. Why is that, sir?
>
> "A. I am not used to this kind of world. It is like landing on Mars. You'd say, 'How are we going to live there?' " (D 984-85)

Similarly, some years ago Mr. Chiantia, in his position as President of the NMPA, wrote to the President of AGAC,

> "Let us meet our problems and our adversaries together and draw strength from our common cause." (D 322)

When asked who "our adversaries" are, Mr. Chiantia replied,

> "It is very clear who our adversaries are. Our adversaries are those who wish to take advantage of us and [give us] less than we deserve.
>
> "In this case, CBS might be described as an adversary." (D 323)

Inevitably reinforcing the mutual awareness of publishers and writers of the importance of each member's resistance to direct licensing in a network bypass attempt would be the exchange of views that would doubtless occur in industry councils and otherwise, for that is exactly what happened in the 3M and *Shenandoah* incidents (Addenda B-C).

On the 3M matter, for example, Mr. Chiantia testified to having discussed the 3M proposal with "Mr. Leon Brettler, and many other publishers, Mr. George Joy, Eddy Joy [of Joy Music, now part of the Aberbach group], Richard Rosenthal [of Mills Music, now part of Belwin-Mills Publishing Corp.], and . . . others, many others" (D 305). As he later stated, "There was a lot of talking going on [at] that time" (D 310). Views and advice on

the matter were widely exchanged (Arrow Tr. 1373-74; Brettler D 214-220, 229-30; Chiantia D 305-09, 311-14, 329-30; Herman D 634; Wattenberg D 1008-09) and intensive interest was shown in what position others would take. Paramount/Famous Music Corp., after being approached by 3M, adopted a posture of "wait and see" because "we wanted to check and see if we were going about it the right way, and if we were doing anything wrong in negotiating with 3M" (Herman D 632). Mr. Brettler also was unwilling to make a commitment to 3M until he was certain it "was lining up really a sufficient contingent of publishers . . . and it looked like [3M] was going to be able to make a direct deal" (D 219). And, as Howard Richmond, President of The Richmond Organization, instructed his then Director of Business Affairs, Alan Shulman, "nothing goes ahead until there's an industry decision" (E 880).

3. The Bases on Which the District Court Disregarded or Discounted Such Evidence.

The principal error committed by the district court in viewing such evidence was an error of law rather than fact. As indicated earlier and in our brief, the court did not assess the evidence reviewed above to determine whether it established the several propositions to which it applied (*see* Points I. D.2., III. B. and IV. A. of our Brief), but only to determine whether it proved a further and irrelevant proposition—specifically, whether "the 'disinclination' of writers and publishers to leave the blanket system would ripen into a refusal to deal directly" (Pet. App. 86a).*

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*On that the court found that, while

> "most of the writers and publishers who testified expressed concern similar to those of CBS deposition witnesses" (*ibid.*),

those called by ASCAP at trial

In the process, however, the district court did discount some of the evidence involved; and for that, its grounds were clearly erroneous.

For example, the court noted "in passing that only one of the four deponents on whose testimony CBS relies in support of the 'disinclination' issue was called by CBS to testify at trial" (Pet. App. 86a). Apart from the fact that CBS relied on more than four deponents (as the evidence reviewed above shows), the statement implies that CBS's failure to call ASCAP members at trial somehow minimized the significance of their deposition admissions.

Two of the four witnesses referred to are officers of named defendants in this case; the other two are officers of corporate members of a defendant class. The testimony referred to constituted unequivocal admissions of highly pertinent facts.

There is no rule of evidence requiring the party who has obtained such admissions in a deposition from an opposing party to put that opposing party on the stand to reiterate his admissions. On the contrary, it was defendants' obligation to call those witnesses at trial if they wanted the admissions explained away; and their failure to do so, or to examine other witnesses on these subjects, not only left the evidence unrebutted, but also required an inference that the testimony would have been adverse to defendants had it been elicited. *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208, 225-226 (1939); *International Union, United Automobile, Aerospace and Agricultural Implement*

"persuasively suggested that they would deal directly with CBS, at least *ex necessitate*" Pet. App. 90a.
It is only the "*ex necessitate*" part of that conclusion which is pertinent to the issues of the case.

Workers of America (UAW) v. *NLRB*, 459 F. 2d 1329, 1335-36 (D. C. Cir. 1972); *Dow Chemical Co. (U. K.)* v. *S. S. Giovannella D'Amico*, 297 F. Supp. 699, 701 (S. D. N. Y. 1969); *and* II *Wigmore, Evidence* § 285 (3d ed. 1940).*

Additionally, the court attacked both Brettler's and Morris's admissions on the ground that, "when read in their entirety, the depositions take on an entirely different hue" (Pet. App. 85a). To establish that, the court then quoted certain passages from those depositions which could give the admissions a different "hue" only if the passages themselves were ripped from context and *not* "read in their entirety."

Thus, as to Brettler's admissions, the court noted,

> "For example, Brettler testified that 'there is no question of the fact that we would negotiate something' if a producer requested performance rights (Dep. 184-85), and that 'hordes' of other publishers would do the same. (Dep. 304-05)" Pet. App. 85a.

The court did *not* note, however, that Brettler's statement about "hordes" of other publishers was expressly condi-

*The district court also devoted considerable space to the proposition that the "three CBS witnesses who predicted that writers and publishers would refuse to deal" (Sipes, Wright and Vincent) were "unimpressive, particularly inasmuch as none of them had ever spoken to a publisher or writer in relation to performance rights licensing" Pet. App. 80a-82a. That discussion forms one of the more curious passages in the opinion. For while the views of those three witnesses regarding writer and publisher resistance were naturally raised on both direct and cross examination, the testimony in that regard related solely to their own states of mind; it was neither elicited for the purpose of proving such resistance, nor was it even mentioned, let alone relied on for that purpose, in the proposed findings of fact CBS submitted to the district court after trial.

tioned on the assumption "that ASCAP suddenly stopped licensing" (Brettler D 187); and the court did *not* note that Brettler's statement "that we would negotiate something" was expressly conditioned on a number of assumptions (which Brettler himself labeled as "unreal") including the assumption that "we agreed that we wanted to proceed [with a producer's] using this song" (D 139).

More fundamentally, of course, the fact that Mr. Brettler "would negotiate something" even under the unreal assumption that he wanted to, hardly removes the impact of his admissions that he regarded that prospect with aversion.

As to Morris, the discoloration of the "hue" of his admissions was achieved, in the district court's view, by a passage of his deposition in which he asserted that he would "talk to" producers and "network people" who approached him for direct licenses and "even go to [their offices]" (Pet. App. 86a). To be sure, Mr. Morris agreed that he would go to the "network people's" office *if* they had called him (the passage quoted by the court); but then he immediately testified (in the next passage *not* noted by the court):

> "Q. Let's suppose that the deal is a license which covers a substantial portion of your catalog. not all, but a substantial portion, and they will pay you $411 every time they use one of your compositions in a feature performance and a percentage of that $411 if they make theme uses or background uses of the music covered by the license.
>
> "Is this a deal that would interest you?
>
> "A. I am no longer in your office.

"Q. Why?

"A. I don't like it.

"Q. Why?

"A. I just don't like it, that is my opinion.

"Q. Why?

"A. I don't consider it anything that I am interested in.

"Q. Why?

"A. I just——

"Q. You would want more money?

"A. I am not saying what I want. You are talking songs, partial catalog. This is all within the realm—I don't know, this is not something that interests me." (D 710-11)

In short, the admissions reviewed above fully stand for the propositions for which they are cited; and, to the limited extent the district court discussed those admissions, it both erred in law in failing to recognize the points to which they were relevant, and erred in fact by relying on out-of-context quotations to diminish their effect.

A ΔΩΩΣΖΩΩΜ B ΔΩΩΣΖΩΩΜ C ΔΩΩΣΖΩΩΜ D ΔΩΩΣΖΩΩΜ E ΔΩΩΣΖΩΩΜ

ADDENDUM B

The 3M Incident

As discussed in Points I.A. and D. of our brief, the fact that defendants are actually selling at fixed prices within their respective combinations makes it unnecessary to consider what the effect of the combinations would be on any putative direct-licensing prices; and yet it is also true, as the court of appeals found, that the blanket licensing system inevitably "provides a disinclination to compete" (Pet. App. 20a, 22a). This record, however, is unusual in that it does contain a case study of both the aversion of publishers and writers to the direct-licensing prospect and the effect of that attitude on price—and that is the incident reviewed in this Addendum.

The facts involved are also pertinent to the barriers to a bypass (which underlie the CBS claims of tying, monopolization and *Zenith* misuse) and defendants' anticompetitive purposes (which would be considered under any rule-of-reason analysis). They were not reviewed for those purposes by the district court (which focused solely on the irrelevant question of whether they proved that music publishing corporations would boycott CBS in the event of a bypass attempt), or by the court of appeals (which focused only on whether they proved that a direct licensing market "will not work"—a contention we did not advance, and to which they are equally irrelevant).

We turn first to the background facts which are essential to an understanding of the incident but which, in largest part, were not referred to in the district court's opinion.

1. Background Facts.

In 1964, the Minnesota Mining and Manufacturing Corp. ("3M") took preliminary steps toward the development of a new concept in background music services: the sale of tape players and background music cartridges to

doctors, small stores, restaurants and other establishments not serviced by the established wired music companies (*e.g.*, Muzak, Seeburg). The project was called the M-700 to designate the fact that the cartridge would contain performances of 700 musical compositions. To make the product marketable, 3M had to obtain performance rights licenses to the music it planned to incorporate on the tapes, thus sparing its customers that task. 3M approached ASCAP for such licenses. [E 833; Arrow Tr. 1257-59, 1263-67; *see also* E 853, 881]

The 3M-ASCAP negotiations commenced on or about February 5, 1964. By October 1964, the parties were still deadlocked with respect to several key structural aspects of the proposed transaction.* ASCAP's demands were incompatible with 3M's plan to sell the equipment, rather than lease it; and the sale approach was, in 3M's judgment, an essential part of the prospective appeal of the project to the new class of users to whom it would be directed. [E 838, 840, 842; PX's 485A-B; Arrow Tr. 1266-67, 1269-72, 1298-99, 1312-13, 1317-19; *see also* E 853, 881; Brettler D 208-12]

Because of the impasse reached, 3M concluded that while there was little possibility of ever resolving these problems, there was no realistic possibility of doing so prior

*For example, ASCAP adhered to the position that the license cover the entire ASCAP repertory, rather than a limited number of songs; that the licensing period for all purchases of the 3M equipment terminate on the same date regardless of the date of each user's purchase; and that songs placed on the ASCAP restricted list during the licensing term be eliminated from the coverage of the license (as they were under ASCAP's licenses with the wired music services). Under ASCAP blanket licenses with broadcasters, ASCAP has the right to remove certain songs from the coverage of the licenses when members have requested that their use be restricted because of over-exposure. Once 3M tapes containing any such music were sold to ultimate users, it would not have been possible for 3M to recall the tapes and eliminate restricted compositions. [*See* citations collected at the end of the paragraph in text.]

to April 1965, which was 3M's internal deadline for commencing production of the tape players and cartridges. 3M was therefore presented with two alternatives: it could abandon the project (a step which it considered seriously in light of the fact that its investment in the project to that date had not been extensive) or it could attempt to obtain performance rights to 700 songs directly from music publishers. It decided to pursue the latter course. [Arrow Tr. 1312-13, 1317-19, 1324; *see also* E 881]*

In that effort, 3M's principal representatives were Ray Lindgren, the general manager of the project, and Allen Arrow, a New York lawyer prominent for his representation of music publishing corporations and known personally to most of the publishers he and Lindgren sought to interest in the 3M proposal. [Arrow 1256-57, 1268-69, 1325, 1498-99; Chiantia Tr. 2987-88]

Their basic approach to each publisher was the same. They related in some detail the history of their negotiations with ASCAP and explained the structural problems which had caused those negotiations irretrievably to break down. They therefore advised the publishers that the success of the M-700 project depended upon publishers' willingness to license 3M directly and that their failure to do so would preclude the development of an important

*The district court stated that "ASCAP suggested to 3M that it deal directly with copyright proprietors" (Pet. App. 95a). What the court did *not* note is that no one on the 3M side of the negotiations lingered under any illusion that that was an ingenuous suggestion. Reports were soon received by 3M that "an effort was being made" by "ASCAP as a society, ASCAP members, ASCAP directors" to "prevent us from getting direct licenses" (Arrow Tr. 1358-59), and ASCAP's general counsel advised 3M that it "would not be able to produce its First Series without an ASCAP contract" (E 868). Mr. Finkelstein's statement was recorded in a contemporaneous document by 3M's lawyer, Allen Arrow, and while Mr. Finkelstein was called to the stand by ASCAP, he was not asked to deny that he made that statement.

new source of income for publishers. [E 853, 881; Arrow Tr. 1327-28, 1330, 1350, 1378-79, 1394, 1400-01, 1409, 1413-14, 1419-21, 1425, 1492-93; Goodman Tr. 1554; Chiantia Tr. 2988; Brettler D 202-11, 216-18, 221-22, 232; Chiantia D 304]

Each publisher was offered performance fees of 3¢ per song, per cartridge sold, and mechanical fees of 2¢ per song, per cartridge—the latter of which was plainly in excess of prevailing market price levels in mechanical rights as pointedly illustrated by the far lower figures accepted by publishers in later years, in connection with the M-1200 project, as to which 3M did accept a blanket license from ASCAP.* [E 652, 853, 871, 881; Arrow Tr. 1328-29, 1350, 1378-79, 1394, 1400-01, 1409, 1413-14, 1420-21, 1474-75; Herman D 634-35; Wattenberg D 999-1000; *compare* Berman Tr. 841 *with* 3M PX's 23, 39, 41]

Moreover, 3M offered each publisher a guaranty of $300 per song, per year (so that for a publisher having 100 songs on the tape, the guaranty would be $30,000 a year). That guaranty was based on minimum projected sales of 6,000 tapes a year (*i.e.*, 3¢ + 2¢ per song, per tape sold x 100 songs = $5 x 6,000 tapes sold = $30,000). 3M's more realistic projection was that it would annually sell

*3M offered publishers 2¢ per song, per tape for a mechanical rights license. At the projected, and realized, sales volume of 12,000 tapes per year, a publisher would annually receive $240 in mechanical rights fees from 3M for each song (E 833; Arrow Tr. 1474-75, 1478, 1484-85; Herman D 635). The going rate for a mechanical rights license for wired music service was $5 per song, per year, irrespective of the number of installations (Berman Tr. 841). In fact, prior to the time Mr. Arrow approached publishers for direct performing rights licenses, he anticipated obtaining mechanical rights licenses at the $5 per song figure (Arrow Tr. 1323) and that is the rate for which 3M did obtain them on the M-1200 series (*see, e.g.*, 3M PX's 23, 30, 41). Thus, 3M offered publishers, on the M-700 series, 48 times the going rate for mechanical rights licenses.

twice that number of tapes (thereby paying a publisher having 100 songs on the tape $60,000 a year) and 3M met and eventually exceeded that estimate. [E 652, 833, 853, 871, 881; Arrow Tr. 1329-30, 1350, 1378-79, 1474-75, 1478, 1484-86; Chiantia Tr. 2988; Herman D 635-36]

The guaranties themselves (and thus obviously the more realistic projected royalties) represented, for the publishers approached, amounts that were equal to or substantially higher than the publishers' entire ASCAP distributions in respect of all wired music companies which were established operations servicing the large office buildings, shopping centers, hotels and factories throughout the country.* [PX's 418, 459; Arrow Tr. 1258-59, 1492-93]

Furthermore, each publisher was told by 3M, and had independent reason to know, that it would have a larger number of songs on the M-700 tape if it licensed 3M directly (and would thus earn far higher royalties) than if 3M had dealt with ASCAP, having ASCAP's entire pool of music from which to choose. [E 871; Arrow Tr. 1384-85; Brettler D 223]

*Executives of the major publishing companies are necessarily aware of the amount of income they realize from significant revenue sources (*see* Chiantia Tr. 2938). It is, therefore, a fair inference that, during the 1964-65 period, they were either aware, within close estimates, of what their wired music earnings were or knew that such earnings were insubstantial in relation to the 3M offers (which, as discussed more fully at pp. 11, 18, 36, *infra*, would have represented to these publishers clearly significant additions to their performance rights royalty income).

While wired music distribution figures could not be obtained during the course of pre-trial discovery for the 1964-65 period in which 3M approached the publishers, they were produced for the years 1967-69. In virtually all cases, publishers' wired music distributions displayed an escalating trend, so that it is reasonably certain that the pre-1967 wired music distributions were less than those recorded after that date. Nevertheless, the comparisons made here with the 3M guaranties are to the 1967-69 figures. PX 459 shows the ASCAP credits earned by publishers with respect to wired music and similar services. Those figures are multiplied by the dollar value of an ASCAP publisher's credit (PX 418) to arrive at the figures for wired music distributions.

In comparison with any CBS attempt to license its needs directly, 3M should have faced little publisher resistance, even given general publisher antipathy to licensing outside the cartel.

First, the 3M project involved a new, experimental use, limited to a finite number of songs. As such, it presented little, if any, possibility of instigating a chain reaction of direct licensing among other users, none of whose needs were as predictable or capable of being confined to so small a number. [Fisher Tr. 1691-94, 4796-98; Nathan Tr. 4121, 4124-25; Arrow Tr. 1492-93; Chiantia Tr. 3024-25, 3027-28; Brettler D 215-18, 236-37; Chiantia D 279-80, 308-09; Morris D 682]

Second, the 3M offer represented an entirely new source of income to publishers and entailed virtually zero overhead cost. The doctors' offices and, in largest part, the small commercial establishments to which 3M would sell its tapes, were *not* paying royalties to ASCAP or anyone; and to obtain this new revenue, it was unnecessary for publishers to create any direct licensing facilities or, indeed, take any affirmative steps at all. [Fisher Tr. 1691, 4796; Nathan Tr. 4120-21; E 652, 853, 871, 881; Goodman Tr. 1554; Shulman Tr. 3105-06; Brettler D 215-18; Herman D 638; *see* pp. 3-5 *supra*]

Third, 3M was not asking the publishers to compete on a price basis; it made the same price terms available to every publisher (indeed, 3M gave each publisher a "most favored nation" clause), and those price offers obviously contained substantial premiums tendered to induce publishers to license in this new fashion—*i.e.*, directly to a customer. [*E.g.*, E 1275-76 (para. 18); p. 4, *supra;* pp. 11-40, *infra*]

Fourth, publishers could have no reasonable expectation, by refusing to deal, of forcing 3M back to ASCAP on the M-700 project. It was apparent that 3M could not conclude an agreement with ASCAP (and many publishers approached verified this fact with ASCAP). Moreover, while 3M's needs were quite limited, and the time it had to fill those needs relatively long (six months), 3M had comparatively little at stake if it could not obtain those rights by direct licensing, other than writing off the design costs and the time of the project personnel (a far cry from the vulnerable position to which a television network would be exposed, with nothing short of its competitive viability at risk and immense time pressure involved). [Fisher Tr. 1685-86, 1688-90, 1961-94; Nathan Tr. 4122, pp. 3-4, *supra;* pp. 11-40, *infra*]

Fifth, if publishers in fact refused to license 3M, the project was likely to be abandoned with a consequent loss to the music publishing industry of these windfall amounts. [Fisher Tr. 1691-92, 4796; pp. 2-3, *supra*]

Despite those facts, nine of the major publishers approached by 3M either flatly refused to deal or dragged the negotiations out so long as to moot the question. As disclosed by contemporaneous documents or testimony, each of those publishers shared the determination to keep direct licensing out of the performance rights field—an objective which would logically apply with considerably magnified force to any attempt by a television network to bypass the ASCAP system. [Fisher Tr. 1699, 4796-98; pp. 11-32, *infra*]

2. The Findings of the District Court.

The ultimate finding reached by the court below was

"that the incident, if it proves anything at all, estab-

> lishes that copyright proprietors would deal with CBS for direct licenses." Pet. App. 97a.

Whether they "would deal" is, again, beside the point; but the findings and comments on evidence relied on below to reach that conclusion must be considered for a clear understanding of this matter.

The district court below stated that 3M, on the first series of M-700 tapes, "signed contracts with 27 of the 35 publishers it approached" and only eight manifested an "unwillingness" to deal (Pet. App. 95a, 97a). Unquestionably, it is the first series that is most important in testing publisher and writer hostility to the direct-licensing prospect, because, at the time of the second series, 3M's disassociation from ASCAP was an established fact. The court's numerical findings on both series, however, are plainly wrong.

It was not eight publishers that refused to deal; it was nine.* It was not 27 publishers that signed contracts with 3M on the first series; it was eight.** (Shapiro, Bernstein; MCA; Jewel; Bourne; PIC; Hi-Ti; Consolidated; and Compton—E 1300, 1412, 1507; 3M PX's 24, 32, 50-52, 56).

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*Although the district court opinion recites that eight publishers refused (copying the error in BMI's post-trial brief), the opinion lists the nine publishers—Chappell, MPHC, Famous, Morris, Berlin, Richmond, Robbins, Bregman and Frank. Pet. App. 97a-99a.

**Eighteen other publishers dealt with 3M on the second series (E 1231, 1244, 1257, 1278, 1289, 1328, 1339, 1352, 1379, 1400, 1432, 1446, 1458, 1471, 1496, 1517; 3M PX's 57, 59). Discovery was not conducted with regard to the attitudes of those firms because of the relative unimportance of the second series and the publishers themselves. Those 18 firms combined account for only approximately 3.5% of the CBS music uses, according to the ASCAP music study (E 660; AX 160).

Moreover, the district court compared the publishers which dealt with those unwilling to do so, as if they were publishers of equal rank; and as if those which dealt, did so for reasons that would be applicable to CBS. Nothing could be farther from the truth. As will be shown below, of the eight publishers that dealt, one publisher admitted that he so regretted the decision that he would not do it again, and would *not* license CBS directly (Jewel—Goodman Tr. 1631-32); and two others conceded that the decision had to be "wrestled with" or caused considerable turmoil within the company and then gave reasons for overcoming such resistance that demonstrate a far greater hostility to dealing with CBS (Shapiro, Bernstein—Brettler D 235-37; MCA—Arrow Tr. 1364-65; Chiantia Tr. 2991-92, 3017-18, 3028; Chiantia D 294, 299, 312). The remaining five publishers which dealt were so minor in stature that, in total, they accounted for 0.1% of the ASCAP credits generated by CBS music uses during the period covered by the ASCAP music study. In contrast, the nine publishers who declined to deal with 3M accounted for 40.5% of the CBS-generated ASCAP credits during that period.* [E 660; AX 160]

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*Equally confused is the footnote at Pet. App. 95a, where the district court concluded that 3M "paid $6 less per tape than the amount of its first offer to ASCAP." In point of fact, 3M offered to pay ASCAP $27 for performance rights per tape for three years (E 833) *and* would have paid publishers a total of $10,500 for mechanical rights ($15 per song x 700 songs = $10,500; Arrow Tr. 1323; Berman Tr. 841)—which, when averaged into the 18,000 tapes it expected to sell in three years, comes to an additional 59¢ per tape. Thus, if 3M had obtained licenses from ASCAP, 3M would have paid $27.59 per tape for performance and mechanical fees. By licensing directly from publishers, 3M instead paid $35.00 per tape (5¢ x 700 = $35) or, $7.41 per tape *more* than 3M offered to pay through ASCAP.

The court also misstated ASCAP's first offer, erroneously believing that it was "per tape", while in fact, ASCAP was only willing to license "per location" (E 840), and 3M was planning to (and did) sell each location more than one tape. Thus, the prospective cost to 3M of ASCAP's offer was not comparable to 3M's cost of licensing directly.

While the district court did find that

> "There is considerable evidence that the publishers 3M approached viewed the M-700 proposal with some reservations" Pet. App. 95a,

it commented that

> "the evidence as to the 3M incident was developed in large part through documents and deposition testimony; and included considerable hearsay in the testimony of Allen Arrow" Pet. App. 96a-97a

—and concluded

> "We cannot give significant weight to arguments as to the state of mind (*e.g.*, disinclination) of the publishers approached by 3M based on such evidence." Pet. App. 97a.

The question that naturally arises is, why not? How else can the state of mind of an opposing party be proved when it is against his interests to admit it. If it cannot be proved by admissions in contemporaneous documents, by admissions elicited in depositions and by admissions testified to by a member of the Bar (who was obviously giving testimony against the interests of his publishing clients), then there could be no realistic possibility of proving state of mind.

Also, with respect to state of mind, the court below observed that the attitudes reflected in the 3M incident were not applicable to a CBS bypass because "CBS and copyright proprietors would be trading for a very different horse than did 3M" (Pet. App. 96a). It is, however, precisely those differences—the five differences outlined above which the

court below never mentioned—which make the facts of this incident applicable here *a fortiori*.

Finally, the court noted that "it *appears*" that "there were legitimate business objections" that underlay the publishers' rejection of the 3M proposals rather than "general opposition to direct licensing" (Pet. App. 97a). If that statement was intended to be a finding of fact, it is the most clearly and remarkably erroneous finding in this opinion, as we will now show.

3. The Publishers That Declined to Deal.

a. Chappell.

Chappell, Inc., was the first publisher approached since it "had the catalog most sought after by 3M" (Arrow Tr. 1326). The terms 3M offered Chappell were set forth in Lindgren's letter of November 27, 1964, to Chappell's Managing Director, M. E. Ricketts:

> "We have offered you a minimum of 200 titles out of the 700. At five cents per title per tape, $10.00 per tape, we would be paying you $300,000 in the next three years and it would go on and on after that." (E 886)

To put that figure in perspective, the mechanical rights portion of that amount ($120,000) was more than three times the total fees ($37,000) which Muzak pays to the entire music publishing industry for electrical transcription rights to more than 3,000 songs. [Berman Tr. 842; *see* Wattenberg D 993-96, 999-1000]

Although Mr. Ricketts initially indicated that he might be prepared to deal, in the event ASCAP "didn't do it or couldn't do it" (Arrow Tr. 1332), he expressed sufficient question as to whether 3M had exhausted the ASCAP

route as to prompt Mr. Lindgren to explain that point further:

> "In regard to the ASCAP matter and a license we tried to get on behalf of the ultimate purchaser of the new 3M equipment and music tapes, it was not that they refused to give us a license but, rather, that the terms of what they offered were such that we felt that our sales would be seriously inhibited; also, because of these terms, there was a distinct possibility that 3M would abandon the project entirely.
>
> ". . . .
>
> "It was after the last meeting, in sheer desperation, that Allan and I dropped in to see you, feeling we had just about exhausted any possibility of an equitable solution with ASCAP.
>
> "I outline the foregoing because, in our discussion the other day, I sort of got the impression that you thought we had made no attempt to get a license from ASCAP. To the contrary, we tried our best to deal with them." (E 883)

Shortly thereafter, however, Chappell indicated through its counsel, Philip Wattenberg, that it "would not enter into this kind of agreement with 3M" (Arrow Tr. 1338). The reason given by Wattenberg was "that Mr. Ricketts felt, in particular, that the performing rights should be licensed by ASCAP and that Chappell was therefore unwilling to make a direct license with 3M" (Arrow Tr. 1338-39; *see* Wattenberg D 1010-11).

Some years later, 3M sought a mechanical rights license from Chappell on the M-1200 project (as to which performance rights were licensed by ASCAP). As Arrow wrote to Ricketts, this proposed agreement, unlike 3M's prior offer to directly license performance rights, should "not cause you to search your conscience before executing it" (E 846). Ricketts' response set forth his own version as to why Chappell had rejected that prior 3M proposal:

> "As you know, I was all in favour of the 3M deal from the start, but it was Chappell & Co. Inc. that would have been in trouble with ASCAP. . . ." (E 848)

Although the implications of that evidence are stark, none of it was referred to by the district court. Instead, the court found that Chappell refused the 3M proposition

> "because of concern that the sale of the M-700 tape would, in effect, put a perpetual free performing right in the hands of 3M's purchasers unless ASCAP licensed and policed those rights. . . ." Pet. App. 97a.

While "policing" might have been a "concern," the evidence hardly justified a conclusion that it was a primary, let alone the exclusive concern. These tapes had a short life expectancy and were likely to be unusable after four or five years (E 461; Arrow Tr. 1321-22). Even if 3M did not renew its direct licenses with publishers after the initial three-year term, and the establishments were not policed, that would give them one or two years of "free" performances. Matched against the $300,000 that 3M was offering Chappell, the notion that one or two years of un-

licensed use should form a major deterrent to accepting that money is implausible in the extreme.

The establishments to which 3M was expecting to sell their machines were those which were for the most part playing radios and not paying performance fees to ASCAP. Thus, even if after the initial three-year period, some users attempted to infringe, the result was no different from the already existing state of affairs. As Leon Brettler stated:

> "I really felt that this device 3M had, this program they had, was going to open up markets. The music was being used anyway and we weren't getting a dime by and large. We don't get a dime when a restaurant uses a commercial broadcast live in the establishment. We get that money from the broadcaster but we don't get it from the restaurant user." (D 217-18)*

In point of fact, however, the "policing" of 3M tapes was relatively easy to achieve. 3M offered to give publishers a list of the names and addresses of each establishment which, after expiration of the three-year term of license, did not renew its license with 3M (E 881; Chiantia Tr. 3007-11). Once those establishments were pinpointed, it would have been a simple matter to have a witness verify that a 3M tape was being played, and to sue for 700 in-

*In *Twentieth Century Music Corp.* v. *Aiken*, 422 U. S. 151 (1975), this Court noted that ASCAP has been unable to obtain licenses from most such establishments:

> "One has only to consider the countless business establishments in this country with radio or television sets on their premises—bars, beauty shops, cafeterias, car washes, dentists' offices, and drive-ins—to realize the total futility of any even-handed effort on the part of copyright holders to license even a substantial percentage of them." *Id.* at 162.

fringements (at the then statutory minimum rate of $10 per performance, the recovery would be $7,000 plus attorneys' fees). The news of a few such suits would have quickly deterred other unauthorized uses. And, as ASCAP Board member, Salvatore Chiantia, testified, it "is one of the functions of ASCAP to detect and forestall and terminate . . . unauthorized uses" (D 295), and there was no reason, in terms of that function "why an unauthorized use of a 3M tape by a commercial establishment is any different from any other unauthorized use of ASCAP music by a commercial establishment" (D 296).

b. The Big Three.

3M's approach to the Robbins, Feist and Miller group (better known as "the Big Three") was rejected before 3M could even offer a guaranty. (It is, however, a fair inference that the parties understood that the amount involved would be substantial; the Big Three is the largest ASCAP publishing company in the country in number of songs in the ASCAP Index of Performed Works, second largest in terms of ASCAP distributions, and considerably larger than publishers to which 3M was offering guaranties of $30,000 or more a year.) [PX's 94, 429; Arrow Tr. 1400-03]

Arnold Maxin, General Manager of the Big Three and a Board member of ASCAP, first indicated that he wanted to learn more about the project (not from 3M; obviously, from representatives of ASCAP or other publishers). Shortly thereafter, Maxin informed Arrow that the Big Three was not prepared to "enter into this kind of agreement" because it would be "disloyal" to ASCAP to deal

directly with 3M for performance rights. [Arrow Tr. 1401-03]

The district court found that the Big Three's "reluctance to deal appears to have been motivated from a sense of devotion to ASCAP" (Pet. App. 99a). The word "reluctance" is off target in the light of the facts; but the main problem with respect to that finding is that, in view of the court's ultimate conclusions regarding the incident, it was not given any weight.

c. Paramount/Famous.

3M first approached Paramount/Famous Music Corp. on October 29, 1964. The negotiations were conducted on behalf of that company by Arthur Israel, President, Sid Herman, Vice President, and E. Compton Timberlake, inside counsel. [Arrow Tr. 1378-80; Herman D 627, 629-31, 633-34]

In the course of the negotiations, Arrow wrote to Israel, apparently in response to Israel's expressed preference that 3M deal with ASCAP, comparing Paramount's financial position on that alternative with the terms offered it on a direct licensing basis:

> "This will confirm our conversation of this morning in regard to the comparison of the net return to Paramount dealing directly with 3M as against through ASCAP.
>
> "You will find the *highest* annual rate per location on an ASCAP license through a wholesale distributor such as a 3M dealer is $30.00. ASCAP has already offered us a rate of $18.00 per year for

> offices and factories. However, for the sake of this comparison and how Paramount comes out, we will deliberately use the $30.00 per year rate or $90.00 for three years. We will also assume, for the moment, that ASCAP will have *no overhead* whatsoever in collecting these performance fees. Thus, we have made the picture look as bad as we possibly can for this new 3M proposal—the *highest* rate and *no* overhead for ASCAP.
>
> ". . . .
>
> "As it happens, since all of our present music was procured with no thought of whom the publisher may be but only if the music was suitable for our purpose, there are only seven selections controlled by Paramount/Famous. This is exactly 1/100th of the 700 total selections. Thus, even at the highest rate of $90.00 and no overhead expense for ASCAP, you would be entitled to exactly 90¢ plus 14¢ mechanicals or a total of $1.04 for that tape for three years use.
>
> "We have guaranteed you a minimum of 100 selections out of 700 at a rate of 5¢ for three years for both performance and mechanicals or a total of $5.00 for the same tape.
>
> "Actually, if a more realistic average ASCAP rate were used, instead of the top rate, and if the realistic overhead factor was figured in, you would probably receive more like 60¢ instead of $1.04.

"I believe this will clarify our proposal for you in such a way that you can easily show the very considerable advantage to you of dealing directly with 3M.

"The key to all of this, of course, is the fact that we will be restricting our 700 selections to a very small group of publishers and thus your participation is 100 selections instead of seven." (E 872-73) (Emphasis in the original.)

In short, 3M was offering Paramount/Famous more than 5 times what it would have expected to receive if 3M had licensed from ASCAP. The guaranty alone of 100 songs would have generated revenues that were approximately 120% Paramount/Famous' wired music distributions in 1967. [PX's 418, 459-C]

Despite the unmistakable superiority of the 3M offer, Mr. Israel, instead of accepting those terms, held "some discussions" with "either representatives or directors of ASCAP" and advised 3M "to go back and have another try at entering into an agreement with ASCAP" because he thought, on the basis of those discussions, that "the situation should be a little easier for 3M from that point forward" (Arrow Tr. 1387).

Shortly thereafter, Timberlake notified Arrow that "in his company's view [3M] ought to go back and try to reopen negotiations with ASCAP" (Arrow Tr. 1388). As a practical matter, that meant, as Mr. Herman testified,

"Q. . . . . 3M came in with an offer of essentially a guarantee of $75,000, and if they met their

projection of 1000 tapes per month, that would have been $150,000. Isn't it a fact that it would have cost Famous very little to enter into this transaction?

"A I don't think it would cost them anything to enter into it.

"Q It was just $150,000 gravy?

"A $150,000 down the drain, that's right."

(Herman D 637-38)

And the company was prepared to throw this money away, for Timberlake finally advised Arrow that the company might damage its "strong position with ASCAP", in doing "something which would be new and which Mr. Timberlake felt might be contrary to ASCAP's best interests" (Arrow Tr. 1390-91).

According to the district court, Paramount/Famous rejected that money because of the "policing" problem (Pet. App. 98a). That explanation, nowhere evident in any of the contemporaneous documents, was given by Mr. Herman at his deposition in this case (which was one of the last depositions taken on the 3M incident and at a time that the purpose of this discovery was well known). That it was self-serving is not a factor mentioned by the court. That there were other reasons apparent on the record was likewise not alluded to by the court.

d. Bregman Vocco.

Jack Bregman, President of Bregman Vocco & Conn, advised Arrow that "it was wrong for 3M to obtain or attempt to obtain licenses to perform music directly from music publishers" and that "his company was not prepared to issue such licenses" (Arrow Tr. 1408).

In discussing the situation with Salvatore Chiantia, President of MCA Music, Inc., Bregman "got very emotional about it and said it was a mistake"—"a mistake to leave ASCAP and license on our own"—"a mistake to license individually" (Chiantia Tr. 3024; Chiantia D 308-09). Indeed, Bregman wanted to know "where was it going to stop, if you license this individually, you have to license everything else individually" (Chiantia Tr. 3024; Chiantia D 309).

Bregman Vocco was the only other publisher whose "reluctance" to deal was attributed by the court to "devotion" to ASCAP (Pet. App. 99a).

e. Berlin.

For the purpose of interesting the Irving Berlin Music Corp. in the M-700 project, Arrow approached Theodore Jackson, a New York lawyer who represented Mr. Berlin, Jackson indicated to Arrow that he would discuss the matter with Mr. Berlin and eventually he informed Arrow "that Mr. Berlin had said that he was not interested in entering into a license agreement with 3M" (Tr. 1409) because the company was "not interested in licensing performing rights except through ASCAP" (Tr. 1410-11). [Arrow Tr. 1408-11]

The district court attributed Berlin's rejection of the 3M proposal to

> "reasons which are not clear. It appears to have been reluctant to license except through ASCAP, largely because 3M proposed to use too small a number of Berlin songs to make a different decision worthwhile. . . ." Pet. App. 98a-99a

The explanation adopted by the court—"too small a number of Berlin songs"—was what Arrow testified he was given by Jackson *in addition to* the "except through ASCAP" explanation. The differences are that the "except through ASCAP" explanation constituted an admission and, in the light of the new and substantial source of income then being offered by 3M for even a few compositions, is more credible than the adopted explanation. The district court took neither difference into account.

f. Frank Music

3M approached Frank Music Corp. on October 28, 1964. That company (whose catalog consisted principally of the music of Frank Loesser) was a client of Arrow's and he thought that the 3M proposal was a program in which Frank should be interested, for, among other reasons, "the company could use the money" (Arrow Tr. 1535). On December 23, 1964, Arrow set forth his views in writing to Milton Kramer, the General Manager of the company. After stating again in considerable detail the reasons why 3M had been unable to negotiate an agreement with ASCAP, Arrow wrote:

> "The proposal made to Frank Music and its affiliates was a guarantee of 25 selections in the first tape. We would guarantee Frank and its affiliates $7,500.00 per year and expect that the total royalty payable to Frank and its affiliates would be $15,000.00 per year in the first year and that it would exceed that in subsequent years.
>
> "Leon Brettler of Shapiro-Bernstein has done some market research and determined that the 3M program will probably pay to publishers within five

years a total of $3-million per year, of which Frank would receive approximately 1/30th [*i.e.*, $100,000].

"You asked me at the time of our telephone conversation whether I would be embarrassed if Frank did not agree to sign a license with 3M. I told you that my embarrassment would be more acute if Frank did not sign and the program were a success and Frank were not included. My feelings remain the same. I can see no reason for Frank to be on the outside looking in at the publishers who agree to this program." (E 857)

[E 853; PX 429; 3M PX 44]

Despite the attractiveness of those financial terms and the blandishments of its own attorney, Frank rejected the proposal, Kramer writing Arrow on January 12, 1965:

> "In view of our repeatedly expressed position as stalwarts of ASCAP, and since we appear to be of relatively minor interest with respect to the total number of copyrights suitable, I think we would prefer not to go along with this proposition on the first tape." (E 859)

Arrow testified at trial that he considered that statement to be a form of "irony or sarcasm," as well as "being stated with a smile" (Arrow Tr. 1530). In contrast, Arrow testified on deposition that it was his impression that Frank "simply did not want to be considered a maverick" (D 69), but the district court erroneously excluded the deposition testimony (Tr. 1518-21).

The more important facts are that Frank Music rejected a windfall royalty of approximately $100,000 for

five years; that rejecting such "found" money was an extraordinary act of irrational business behavior which would be totally inexplicable apart from the judgment that its long-range self-interests were better served by keeping direct licensing out of the performance rights field; and that even Arrow, its own lawyer, ultimately conceded at least this much:

> "Q Did Mr. Kramer or did anybody else at Frank Music and by that I mean to include Mr. Loesser, state to you in words and substance that Frank Music believed that it should not go into this project on a direct licensing basis because they felt that performance rights should be handled by ASCAP?
>
> "A Mr. Kramer stated that he would prefer to see the performing rights of the company licensed through ASCAP under these circumstances, rather than enter into the agreement with 3M at that time." (Tr. 1527)

The district court attributed Frank Music's refusal of 3M's offer to the "problems of policing and the number of tapes to be used" (Pet. App. 99a). As to the policing ground, we refer to our comments regarding Chappell's refusal to deal. As to the "number of tapes" ground (by which the court presumably meant, the number of Frank Music compositions to be used on the tape), all that is necessary to consider is the $100,000 offered to Frank Music for an acceptance of the proposal and the $0 it received by rejecting it.

g. E. H. Morris.

Arrow approached Harry Gerson of the E. H. Morris Company in late 1964 or early 1965. Gerson indicated that he would have to check with E. H. Morris himself, and later advised Arrow that "insofar as E. H. Morris was concerned, it was a matter which they just would not entertain" (Arrow Tr. 1394).

Arrow did not recall the terms of any specific offer made to E. H. Morris although he testified that 3M regarded the Morris catalog as "approximately equal" to the MCA catalog (for which 3M had offered a guaranty of $30,000 a year) (Arrow Tr. 1396).

The district court found that E. H. Morris rejected the deal because Morris "had completely misunderstood the amount of money 3M was actually offering" (Pet. App. 98a). Since Mr. Morris is the President of one of the largest music publishing companies in the country, and a Board member of ASCAP and the NMPA; since Arrow, a sophisticated attorney, was trying his best to persuade publishers to deal; and since no other publisher had difficulty understanding the terms of the offer, that conclusion is questionable on its face. In fact, a fair reading of the Morris deposition indicates that Mr. Morris not only refused to deal with 3M but refused even to listen to the 3M proposal.

The question as to whether E. H. Morris rejected the 3M approach before or after receiving a specific offer gave Mr. Morris considerable problems on his deposition. For if there had been a specific offer, it would clearly not have been "pennies", and thus his rejection of the deal could not be explained on that ground; but if 3M had not even been given a chance to make a specific offer when Morris

summarily refused to deal, why hadn't Morris at least found out what 3M was prepared to offer before so peremptorily shutting the door?

At first, Mr. Morris indicated that there had been a specific offer:

> "Q Are you sure that the 3M representative had quoted specific terms to Mr. Gerson?
>
> "A I believe so. In memory, I would say that Mr. Gerson discussed it with me and our decision was not to proceed." (D 670)

Mr. Morris then sought to explain his rejection of the offer:

> "We didn't do any business because we didn't want to." (D 669)
>
> "Q As a result of that, the Edwin H. Morris Company did not receive any royalties from 3M on the 3M—in connection with the sale of the 3M tapes; is that right?
>
> "A That is right.
>
> "Q And you thought that situation was better than receiving some royalties from 3M?
>
> "A *The amount involved didn't interest us.*" (D 670) (Emphasis added.)
>
> "Q But you expected the offer would yield more money to your company than the expenses of the licensing?
>
> "A I don't follow that.
>
> "Q It would have been a profit making transaction had you entered into it?
>
> "A When you are dealing in *pennies,* that is not much of a profit." (D 671) (Emphasis added.)

Since the 3M proposal involved far more than "pennies" for every publisher approached, Mr. Morris, on further examination regarding this subject, began to move away from his earlier testimony that a specific offer had been made:

> "Q . . . . I want to know whether it's true that the sole reason you did not really consider granting any form of license to 3M, was because the amount of money involved was too small?
>
> ". . . .
>
> "A I would say the amount of money did not interest us. There was no offer of anything other than what was generally known in the industry to be very small monies.
>
> ". . . .
>
> "I would have to say there were no figures mentioned other than it was rumored it was a small deal. . . ." (D 691-92)

That new position—that there never was a specific 3M offer, after all—obviously led to examination as to why Mr. Morris rejected the approach without attempting to learn whether the deal involved "pennies" or substantial amounts:

> "Q Did you suggest to Gerson he ought to get some specific figures from 3M?
>
> "A No.
>
> ". . . .
>
> "Q Weren't you curious to find out, though, how far 3M might go?
>
> "A My curiosity couldn't be aroused because I was not involved to the extent of knowing that much about it.

> ". . . .
>
> "Q Didn't [Mr. Gerson] express to you some curiosity in this?
>
> "A No." (D 692-93)

In other words, Mr. Morris testified that he was not sufficiently curious to learn what 3M might offer "because [he] was not involved to the extent of knowing that much about it"—despite the fact that it was Morris who made the decision to reject this approach out of hand.

Mr. Morris revealed that he did learn that it had been disclosed at an ASCAP Board meeting that Lou Levy (then Chiantia's superior officer at MCA) and Shapiro, Bernstein had acceded to the 3M proposal (D 672-73, 697); but still Mr. Morris made no effort to find out what 3M might offer his own company:

> "Q. And the fact that Lou Levy had granted a license to 3M, did not intrigue you at all in terms of the possible potential of a 3M deal?
>
> "A. I didn't know about the potential, but I knew that Levy and Shapiro both thought they were making a deal that was good for themselves, but I never heard any figures. . . ." (D 698)

We submit that it is inherently implausible that Mr. Morris in fact rejected this proposal on the basis of "rumors" that it involved merely "pennies" while at the same time refusing to learn what the specific terms of the offer might be. Indeed, on the M-1200 project, after 3M procured an ASCAP license, Mr. Morris's company signed a mechanical rights license with 3M for the grand sum of $5 a year, per composition (3M PX 39). In the light of Mr. Morris' other testimony revealing his extreme anti-

pathy toward direct licensing (*see* Addendum A, pp. 4-7, 11-13), it is far more likely that the actual reason for his refusal to deal with 3M was based precisely on that ground; and that the court's finding, based solely on the Morris deposition (not on demeanor, for Morris did not testify at trial) was plain error.

h. Warner Brothers.

The 3M negotiators met with representatives of Music Publishers Holding Corp. (the music publishing subsidiary of Warner Brothers) shortly after the meeting with Chappell, since they regarded the MPHC catalog to be the "second most important" (Arrow Tr. 1414). On October 29, 1964, Arrow particularized the 3M offer in a letter to George Lee, a MPHC executive:

> "3M further proposes to guarantee to M. P. H. C. that a minimum of Two Hundred (200) selections from your library will be included in the tape program. This will result in an amount payable to M. P. H. C. of Ten Dollars ($10.00) for each tape sold to 3M [i.e., approximately $120,000/yr.]. 3M will agree to guarantee to M. P. H. C. Fifty Thousand Dollars ($50,000.00) per year as a minimum royalty." (E 653-54)

Based on projected sales, MPHC could reasonably anticipate making a clear profit of $360,000 during the first three year term of that proposed agreement (pp. 4-5, *supra*).

The offer, however, could not be accepted, Lee explained to Arrow, because Herman Starr, the chief executive of MPHC, was in the hospital (Arrow Tr. 1414-16). While that was the only reason given to Arrow, the reaction of another MPHC executive, Victor Blau, who became

MPHC's designated member of the ASCAP Board, was evidenced by his statements to Leon Brettler following the Board meeting at which Shapiro, Bernstein's acceptance of the 3M deal had been announced:

> "A ... Mr. Blau said, 'Boy, I hope you fellows know what you are doing here. This thing doesn't make any sense to me at all and you are setting precedents here on rates and so forth. You 'young Turks' —I am not sure that 'young Turks' was the quotation but that was the implication—'you young fellows go into these things slap-dash and you better be careful because a lot is riding on what publishers do and how they do it.'" (Brettler D 246-47)

And it is clear that Blau made this statement after Starr died in 1965, since Blau did not become an ASCAP director until two weeks after Starr's death (PX 401).

The sole ground to which the district court ascribed the inability of 3M to reach agreement with MPHC was that Starr was "ill, and died during the course of negotiations" (Pet. App. 98a). That finding elides the facts and is clearly erroneous on that score.

To show that, we need not question the fact that Lee and Blau would not accept the 3M windfall without Starr's approval; since there can be no doubt as to the nature of the issue on which Mr. Starr had to pass. Surely, that issue did not involve the financial attractiveness of the proposal—which was the equivalent of 3M's handing to MPHC a check for one-third of a million dollars, cost free, with no strings attached. The only conceivable matter of sufficient importance to prevent the acceptance of this money absent that approval was whether MPHC was prepared to deal outside of the ASCAP consortium. Blau's statement to

Brettler indicated that, even after Starr had died and when the success or failure of this modest bypass was still at issue, MPHC was not prepared so to deal.

i. TRO.

At The Richmond Organization ("TRO"), the 3M negotiators met principally with Al Brackman, and the chief executive, Howard S. Richmond, who were advised by inside counsel, Alan L. Shulman. On the first approach, 3M indicated an interest in using 51 TRO compositions. Although the precise number ultimately involved in the 3M offer is not clear, TRO recognized that "there would be dozens of titles involved" and "[e]ventually [3M] said it may be hundreds of titles involved" (Brackman D 82). Based on even one dozen selections, the 3M offer would have generated for TRO revenues substantially in excess of its entire wired music distributions. Based on a selection of 50 compositions, the offer amounted to a guaranty of three times those distributions with a realistic expectation of revenues six times those distributions. [PX's 418, 459 B; 3M PX's 158-59; Arrow Tr. 1419-20; Shulman Tr. 3106-12; Brackman D 74, 78]

On July 15, 1965, Shulman wrote Arrow stating,

> "After giving serious consideration to the proposal for 3M usage of our compositions, we have decided that as a matter of policy we would like to pass this one up." (E 861)

The negotiations nevertheless continued, but, on November 19, 1965, Richmond advised Shulman,

> "Suggest we have a brief discussion between Al Brackman, yourself, and myself so that we can put Harold Orenstein [Arrow's partner] on notice with a friendly but firm letter, *so that nothing goes ahead until there's an industry decision.*" (E 880) (Emphasis added.)

Apart from the so-called "policing problem" the district court below attributed TRO's refusal to deal to the purported fact it was not a financially attractive proposition (Pet. App. 99a). The only basis for that finding could have been the testimony of Mr. Shulman; and his explanation of why the deal was unattractive does not withstand analysis, let alone counter the evidence reviewed above.

Mr. Shulman said that he had done "some arithmetic" and calculated that with 12 TRO songs on a 3M tape it amounted to only ½¢ a performance (Tr. 3094-95). One-half cent a performance, however, represents a princely sum in relation to the amounts paid by the wired music industry on a per-performance basis (or for that matter, in relation to any per-performance calculation of the many commercial uses made of phonograph records)—but those facts were not part of Mr. Shulman's "arithmetic".

Moreover, it is hardly likely that Mr. Shulman's computations formed the basis for Mr. Richmond's conclusion "that nothing goes ahead until there's an industry decision" (E 880). A month after that conclusion was reached—and at least eight months after the negotiations with 3M had commenced—Richmond learned that 3M had been able to put together 700 songs without his assistance and began to have second thoughts about throwing money away (*see* AX 185).

Mr. Brackman (who, unlike Mr. Shulman, was directly involved in the negotiations (Arrow Tr. 1419-20)), also had considerable difficulty explaining the "matter of policy" referred to in Shulman's letter regarding the

3M deal (E 861). He was quite adamant that the "matter of policy" involved was that the 3M proposal

> "required our collecting the writer's share of performances and accounting and paying for that share, which is a matter of principle with us in that we wouldn't have done that." (D 74)

TRO, however, regularly collects, accounts for and pays to writers their share of mechanical rights royalties, movie rights royalties and television synchronization rights royalties (Brackman D 79-82); and Mr. Brackman was unable to explain the "principle" guiding TRO's disinclination to do the same with respect to prospective 3M royalties (Brackman D 79-82, 95).

With respect to TRO and several other publishers, the court below relied heavily (to discount their initial refusals to deal) on the fact that they did deal on the second series of 3M tapes. Those transactions were significant to the court, since its sole focus on the evidence was whether it showed that publishers "would deal" or boycott. Even on that score there is a compelling difference, ignored by the court, between the incentive of a publisher to deal on a user's initial bypass attempt, and the incentive to deal after the user has conclusively demonstrated an ability to bypass. But on the issues to which the evidence actually applies—the level of publisher and writer antipathy to direct licensing by a network, and the premiums that would have to be paid to overcome it—3M's experience on the first series is dispositive, particularly in the light of all the other differences that marked the 3M bypass as trivial in comparison to what would be entailed in a network attempt.

4. The Publishers Who Dealt with 3M.

a. Shapiro, Bernstein.

The two most significant publishers which dealt with 3M were Shapiro, Bernstein and MCA Music, Inc. [PX 94; 3M PX's 50-52]

3M offered Shapiro, Bernstein a guaranty of $30,000 a year which was almost twice its wired music distributions. In point of fact, Shapiro, Bernstein anticipated receiving on this background music project between $200,000 and $500,000 (the latter figure being considerably more than that company receives in ASCAP distributions in respect of three years' worth of CBS uses of its music). [PX's 94, 418, 459-G; 3M PX 50; Chiantia D 312]

Even so, Mr. Brettler (Shapiro, Bernstein's Executive Vice President) "wrestled with this for a week or ten days" (Brettler D 236) because he was afraid that he "might set some precedents that I will be sorry about" (D 235):

> "Q Precedents for what? That is, that you might be sorry about.
>
> "A We described the benefits of joining ASCAP. If every ASCAP member licensed every use directly and ASCAP dissolved because everybody was flying off in a million different directions and ASCAP had nothing to license, you bet I would be sorry about it, and so would every member in view of my testimony." (*Ibid.*)

For that reason, Brettler preferred that 3M license through ASCAP but, unlike nine of his major publishing colleagues, Brettler was moved by the unlikelihood of 3M's being able to deal with ASCAP, and the money involved was more

than he could turn down. At the meeting he had on that subject with Bernard Korman of ASCAP, he said:

> "Bernie, I have a difficult decision to make but unless ASCAP can close this thing fairly soon I don't think Arrow is kidding around, I think he has a group of publishers lined up where he can scrounge out here and there 700 songs that are more than suitable for background music." (Brettler D 219)

For the contribution that Mr. Brettler made toward enabling 3M to compile its tape recordings from compositions that were not merely "scrounged out," and thus toward preserving this new source of income for publishers generally, Mr. Brettler was greeted with the antagonism of the ASCAP Board. After Mr. Finkelstein announced at the next Board meeting that the Shapiro, Bernstein/3M agreement had "come to his attention," "some cannonballs were coming my way," said Brettler, "and I sensed it wasn't the '1812 Overture'" (D 229, 231). (Brettler later allowed that "cannonballs" may have been an exaggeration; it was, he said, more like "spears and harpoons" (D 233).) "But let's face it," said Brettler, "this did come as a jolt" (D 231). The reaction was "intemperate"; "everybody was talking at the same time"; "15 people trying to speak at once"; he was accused in substance of having done something that "was not in the best interests of ASCAP"; and they demanded to know whether he thought "[the ASCAP] legal department wasn't functioning"; "Shouldn't you be more patient?"; "Why did you do it?" (D 231-32, 240).

"Life is simpler," concluded Brettler, "if you don't have to go through those kinds of afternoons" (D 250).

After Stanley Adams, ASCAP's President, "had the

meeting quieted down" and "got [it] in control" (D 231-32), Brettler attempted to justify his act on the following prophetic ground:

> ". . . I said, 'I would like to explain it in our viewpoint,' and I gave pretty much the explanation that I just gave you, that I saw this as an experimental thing, that if it happened on the scale that 3M expected there were going to be more tapes, *3M would have to go back to ASCAP*, and possibly it was a fortunate thing for us to do this, because if the venture flopped, nothing ventured, nothing gained; but if the venture succeeded and this became the new modus operandi of background music, *it would come back to ASCAP anyway*. And anyway, it's done." (D 232) (Emphasis added.)

Brettler made it clear, however, that neither he nor, in his judgment, the other publishers which had accepted the 3M premiums would be well advised to deal directly with a television network:

> "I don't think it is comparable at all to talk about what we did here with a very limited use involving only 700 songs, only for background, at an experimental rate, for an experimental use. I don't think the magnitude of that decision—and I know how long it took me to come to that conclusion; I wrestled with this for a week or ten days. . . .
>
> "Q Do you believe that a goodly number of ASCAP publisher members would have the feeling right off the bat that they should not license a television network under those circumstances?

"A Well, I think I indicated in my testimony all along here that I personally have the feeling that direct licensing of television networks would be—I think I used the word—self-annihilation as an industry. I think what we are talking about in licensing television networks and what we are talking about in what we did in licensing 700 songs to 3M on a limited. experimental basis . . . .

"Q You think it is night and day?

"A No, that is only 12 hours apart. I think it is 360 degrees. I think it is more. I think it is grains of sand compared to watermelons." (D 236-37)

Moreover, even after 3M completed its first series of tapes, Brettler indicated to Arrow "that he preferred not to be identified again as a member of the group which had licensed 3M" because he had been regarded by his peers "as a bad boy or a bad actor in connection with this entire program" (Arrow Tr. 1495). Thus, Brettler (and other publishers who dealt on the first series) urged that a luncheon to which they were invited by 3M not be attended by the press. [Arrow Tr. 1494-95]

b. MCA Music

The offer made by 3M to MCA Music, Inc. was a guaranty of $30,000 a year, with an additional $15,000 for the first year. Those figures substantially exceeded MCA's wired music distributions; and MCA, like Shapiro, Bernstein, actually anticipated receiving as much as $500,000 on this project. [PX's 418, 459E; 3M PX's 51-52; Chiantia D 312]

The negotiations spanned the better part of five months. Arrow had as many as 50 meetings or telephone conversations with Chiantia who, along with his immediate superiors, Lou Levy and Berle Adams, evinced considerable misgivings about going along. [Arrow Tr. 1361, 1365-67; Chiantia Tr. 2980, 3014-19]

Chiantia first checked with Korman to determine whether ASCAP might still license 3M—this, despite the fact that MCA could not possibly expect to earn anywhere near the amounts in an ASCAP deal that it had been offered on a direct-licensing basis. Levy persistently "clung to the hope that ASCAP would come to some arrangement with 3M," and "he preferred that" (Chiantia Tr. 3017-18). His position was: "I think ASCAP is going to make a deal. Why don't we hold off and see what happens?" (Chiantia D 299). Similarly, Adams advised, "if it is possible that ASCAP could license, I prefer that they do it" (D 301). At trial, Chiantia testified to the same point of view:

"Q You thought it was in the best interests of the music publishing industry that performing rights be licensed through the Societies, true?

"A I think that is true as a general matter, yes.

"Q And that was true in this 3M situation?

"A It is true in any situation." (Tr. 2991-92)

Although Chiantia was persuaded that there would be no ASCAP-3M agreement, and consequently executed the proffered contract, Levy apparently disagreed and gave a different version of the facts to the ASCAP Board:

"Mr. Chiantia was in an embarrassing position for another reason. His associate Mr. Levy, had indicated . . . that Leeds wasn't going to do this when in fact Leeds had made the commitment. . . ." (Brettler D 241)

Thus, according to Arrow, Chiantia "called me and asked me to meet with him and Mr. Adams with respect to an incident which I was told had occurred at ASCAP" (Tr. 1364). At that meeting, Arrow related,

> "Mr. Chiantia told me that his immediate supervisor, Mr. Levy, had had a discussion at ASCAP with respect to the 3M license and that Mr. Levy had instructed Mr. Chiantia to renounce the license or to withdraw and Mr. Chiantia thought that the matter was of sufficient importance to involve Mr. Adams, who was apparently the man who had been put in charge of both Mr. Levy and Mr. Chiantia by the acquiring company.
>
> "I was asked to explain the situation to Mr. Adams and I did and I think I told Mr. Chiantia at that time that as far as 3M was concerned and certainly as far as I was concerned on a personal basis if the existence of the contract was in any way embarrassing or if Mr. Chiantia thought he had overstepped his authority in dealing with 3M, we were ready to hand him back the signed piece of paper." (Tr. 1365)

[Arrow Tr. 1352; Chiantia Tr. 2989-90, 3019; Chiantia D 294, 304-05]

In short, the 3M offer to confer as much as $500,000 on MCA, on a cost-free, risk-free basis, required numerous discussions over the course of five months of negotiations, a meeting at which the 3M representative had to offer to tear up an executed contract for fear of "embarrassing" the MCA executive who decided to accept this windfall. and a confrontation between two MCA executives, both of whom agreed in their preference that ASCAP do the licensing,

but one of whom persistently and unrealistically "clung to the hope" that that preferable course would eventuate. Moreover, when Chiantia learned in 1968 that ASCAP had transacted a license with 3M on the M-1200 series, thereby markedly diminishing MCA's prospective revenues on the project, his reaction was "bravo, well done" (Chiantia Tr. 3012-13).

At trial, Mr. Chiantia testified that there was "absolutely" no basis for his preference that ASCAP license 3M other than his "concern about policing" 3M customers after the initial three year term (Tr. 3012). Apart from the facts stated above in connection with the Chappell episode (pp. 13-15, *supra*) it is scarcely credible that this purported problem of policing, viewed particularly against the prospect of a windfall royalty of as much as $500,000, could itself have been a matter of sufficient concern to generate the sort of conflict which obviously occurred within the MCA organization regarding this deal. That Mr. Chiantia understands the more significant problem inherent in direct licensing was made evident in this section of his examination by the Court:

> "THE COURT: You mean that when any direct licensing of a major proportion takes effect, it has the inherent possibility that other people may also ask for direct licensing?
>
> "A I think that it reasonable to assume.
>
> "Q And this would be a matter of concern to you?
>
> "A Yes, it would be a matter of concern. But I wouldn't refuse to license." (Tr. 3028)

And while Mr. Chiantia persisted in his profession of willingness to negotiate direct licenses with CBS, his analysis

of the problems presented by such transactions casts considerable doubt on that naturally self-serving assertion and, at minimum, portends a period of negotiation infinitely longer than the five months spent with 3M:

> ". . . I would have to know how I could exist beyond that time having to license CBS directly, and I would have to know what other possibilities were involved, what other doors would be opened. Would I then start licensing roller skating rinks directly? Would I then start licensing nightclubs directly? Would I then start licensing Joe's Hot Dog Stand directly? Where would it end? I'd have to know all of that in front. . . ." (D 280)

c. Jewel Music.

A third publisher who dealt with 3M, Eugene Goodman of Jewel Music Publishing Company, Inc., flatly admitted that he would not deal directly, either with any category of user within the ASCAP domain or, if he had it to do over again, with 3M itself:

> "Q Do you believe that it's wrong for ASCAP members to compete with ASCAP for the licensing of performance rights?
>
> "A Yes.
>
> "Q Why?
>
> "A Because I think as individuals we have no strength.
>
> "Q Then you believe it's important as a publisher to combine with other publishers and have a common licensing agent?
>
> "A No doubt in my mind.
>
> "Q Do you believe that when individual publishers enter into direct licenses with users which bypasses ASCAP that that weakens the strength of ASCAP?
>
> "A No doubt.
>
> "Q Then if 3M had come to you in the first instance without ever having gone to ASCAP you would have suggested that they go to ASCAP?
>
> ". . . .
>
> "A If I knew then what I know now, the answer is yes.
>
> "Q What do you know now that you didn't know then?
>
> "A I know more about the publishing business than I knew then.
>
> "Q Do you believe that once ASCAP has undertaken to offer licenses to a category of users that the members should refrain from dealing with those users?
>
> ". . . .
>
> "A I do." (Goodman Tr. 1631-32)

At trial, Mr. Goodman attempted to recant that testimony (Tr. 1561-62, 1569-71, 1579-87). Despite his understanding that the ASCAP blanket licensing system protects publishers from "cut-throat" competition in performance rights, the explanation for his present willingness to license performance rights outside of that system was said to be based on the fact that, in the 11 months intervening between his deposition testimony and his trial testimony, publishers' price competition in non-ASCAP areas (*e.g.*, mechanicals) had become "cut-throat" (*ibid.*).

We submit that the illogic of that explanation serves only to reinforce the significance of Goodman's testimony on deposition. Mr. Goodman, as is true of other publishers,

plainly recognizes the desirability of preserving the present ASCAP system as a shield against just such "cut-throat" competition. Made to realize that his deposition testimony was singularly unhelpful toward achieving that objective in this case, Mr. Goodman attempted to change that testimony.

5. The AGAC Reaction.

The reaction of popular songwriters to the news that some publishers had licensed 3M directly was, if anything, even more pronounced than that of the nine major publishers which repulsed that transaction.

In early November 1965, a meeting of AGAC's West Coast Committee, attended by 17 Los Angeles based writers, considered the 3M problem. Harold Spina, West Coast Chairman, reported that the Committee had concluded as follows:

> "1. That AGAC is properly acting in behalf of its members in notifying the publishers that they are in violation of our contract re bulk licenses, etc., and that the publishers must request permission from the writers.
>
> "2. That the writers are to be advised by AGAC of the damaging results that affect the entire performing rights structure should they grant permission to the publishers." (E 459)

Spina further reported, however, that those steps were thought to be inadequate:

> "Rather than place the writer in a position to have to answer the publisher's request and possibly get into an embarrassing or personal beef, it was felt that a solid front could be presented by AGAC

> as follows: A form letter be sent along to be signed by the writers, returned to AGAC, and kept on file, containing essentially the fact that they will *not* grant permission to *any* of the publishers on any of their songs involved.
>
> "It was unanimously indicated here that they would pledge themselves to this cause and enlist most of the other important writers out here to do the same, whether a member of AGAC or not. And, if the same could be done by the boys in New York, that a big dent would be felt by the publishers, who would *not* be able to deliver to 3M a large proportion of their catalogues, and, by weakening the publishers' position, cause 3M to reconsider.
>
> "While we would not put them out of business (because of the pre-1937 songs plus PD's), nor can we stop *some* songwriters from making a deal, our weight of songs denied them might make 3M remove the performance portion of their agreements with publishers and force them to negotiate with ASCAP." (E 459-60) (Emphasis in original.)

On November 15, 1965, Burton Lane, President of AGAC, circulated, at the instance of the AGAC Council, a letter to publishers warning them that direct licensing without writer consent violated the AGAC contract and reminding them of their obligations, not only to writers, but to the ASCAP system:

> "A most disturbing element of this situation, in our view is that 3M is dealing, for performing licenses, directly with ASCAP publishers ignoring completely the writers individually and the performing rights society of which the writers are mem-

bers. (We refer to ASCAP publishers only, because BMI has entered into an agreement with 3M)." (E 851)

While writers in Los Angeles and New York continued to press for some sort of concerted action, and those proposals were discussed at length within the AGAC Council, Lane reported to the West Coast Committee on January 12, 1966,

> "It was pointed out by our attorney and several members of our Council, that the strong letter which we sent to publishers is as far as we can go without raising the question of whether we are conducting ourselves in a manner which might be in conflict with the law as stated in the case of Ring v. Spina, in the U. S. Circuit Court of Appeals. . . . This is not a case where someone is conducting illegal activity—3M is engaged in a legitimate business enterprise, even though we are much concerned with some of the possible consequences of the project. As to the publishers . . . they are not acting illegitimately in a sense which would legally warrant concerted action in order to combat flagrant illegality directly. . . ." (E 467)

Lane suggested, however, that

> "Individual writers, of course, are free to express their opinion to publishers, solely on a private and individual basis." (E 468)

This, however, did not satisfy the West Coast Committee. It took some solace from the report by Ned Washington, one of its members, that 3M's "future was

rather dim since they were having difficulty in negotiating for the big catalogues originally anticipated" (E 485). However, the Committee suggested "that AGAC explore the possibility of deterring 3M through the trusteeship held by some AGAC members of mechanicals" (*ibid.*).

Charges that the AGAC Council was not taking measures that were sufficiently deterrent prompted this riposte from Lane:

> "I want to take very great issue with reference to 'organization weaknesses of AGAC'. . . . Just what are these organizational weaknesses? . . ."
>
> ". . .
>
> "The matter of the 3M situation was previously brought up. *We did a very effective job* in this direction and the statements which we issued, we think, had *great effect in causing publishers to reconsider this question and refrain from participating.* . . . Anything else would have been illegal; 3M is a legitimate corporation engaged in a legitimate business. Our chief concern is that 3M's signing agreements with individual publishers concerning performing rights is inconsistent with the manner of doing business which writers prefer and publishers should prefer, that is, to receive performing royalties through performing rights societies, so far as that is legally possible." (E 481-82) (Emphasis added.)

Apart from warning publishers against direct licensing, AGAC's main role in the 3M incident was an attempt to bring 3M into the ASCAP fold. Its effort in that regard, however, was made more difficult by the ASCAP view that

AGAC itself had not done enough to prevent 3M's direct licensing to begin with.

Thus, on April 21, 1966, at the first meeting held between ASCAP and 3M under AGAC's auspices, Herman Finkelstein took the following extraordinary position, as reported by a letter written by Mr. Arrow on the following day:

> "Herman then amazed us all when he said he thought the [AGAC] letter ill-advised because it was too mild and should have been followed by a lawsuit. Everyone in the room was stunned. I told Herman that I thought he might want to repeat that to his publisher members. . . . Herman however pursued the point saying that if he were AGAC's counsel, he would have 'provoked' a law suit." (E 869)*

Mr. Finkelstein also refused, at that meeting, to grant 3M a license "on a per-item basis," insisting on the blanket arrangement, and warned 3M that "[u]ntil you get the show tunes, you will need ASCAP" (E 473). Major Broadway show tune catalogs were then owned by Chappell and Morris, and the major motion picture compositions by Warner Brothers, the Big Three and Paramount/

*For the General Counsel of ASCAP to advocate that anyone commence litigation against ASCAP's own publisher members because of their indulgence in the direct licensing of a user as relatively minor as 3M is a rather significant indication of the depth of feelings within the ASCAP organization about bypass attempts and some small index of the pressures that would be brought to bear on publisher members that were approached by any television network making any such attempt. Although the documents reporting his statements in that regard were in the record at the time Mr. Finkelstein was called by ASCAP, he was not examined by ASCAP attorneys regarding those statements.

Famous—all of whom, as noted above, declined to deal with 3M. [PX 429; Dean Tr. 1812]

The negotiations between 3M and ASCAP, renewed under AGAC's auspices, finally came apart in late 1967, primarily over ASCAP's refusal to license 3M on a per-cartridge or per-song basis. The deadlock was resolved by recognition on both sides that no agreement could be reached on the M-700 and that the parties should limit further negotiations to the new 3M background music project, the M-1200. [E 866; 3M PX's 85, 86; Arrow Tr. 1463-69,1479-80]

That project differed from the M-700 in three significant respects: each tape consisted of 1200 songs rather than only 700; the tapes and players were to be leased to users, rather than sold; and the project was designed to compete with the established background music services in that it was offered to the larger commercial installations. [Arrow Tr. 1344-2001]

On July 1, 1968, 3M and ASCAP concluded an agreement for the M-1200. With 3M's foray into direct licensing thus effectively quarantined, agitation against 3M ceased, and AGAC claimed credit for bringing 3M and ASCAP together. Indeed, Lane was delighted when 3M finally obtained an ASCAP license, even though he never knew the terms of that agreement, and, hence never had an opinion as to whether, from the writers' point of view, the terms reached by ASCAP were better or worse than those which had previously been obtained by the various publishers. [3M PX's 94-95; Lane Tr. 1104, 1109-10]

The district court's principal focus on (what it termed) "the AGAC ploy" was whether it proved that AGAC could exert sufficient pressure on publishers and writers to get them to refuse to deal directly with CBS—not whether it

demonstrated resistance itself—and its findings on this aspect of the 3M incident all reflect that erroneous standard.

Thus, the court indicated that AGAC would be of little effect because only "8% of the writer members of ASCAP and writer-affiliates of BMI are AGAC members" (Pet. App. 100a). Not mentioned is the fact that the 1200 AGAC writer members of ASCAP supply approximately 45% of the music used on CBS (measured by ASCAP credits). [PX 843; AX's 159, 287]

The court passed off the correspondence from AGAC's California group as emanating from a " 'radical' wing of AGAC which styled itself the West Coast Committee" and which was "rejected" by the AGAC Counsel in New York (Pet. App. 101a). The AGAC letterhead, however, listed the "West Coast Chairman" as an officer of the organization (E 1230), and the AGAC *Bulletin* reported on the election of West Coast chairman and the members of the West Coast Committee (E 655). As is evident from PX 123 (E 459), the members of that group comprised many of the most distinguished songwriters in the country (*e.g.*, Ned Washington, Johnny Mercer, Jimmy McHugh, Harold Adamson, Sammy Fain). Moreover, eight of those members were officers of AGAC and members of the AGAC Council during the period 1964-1970, and Mr. Washington was a writer member of the ASCAP Board (PX's 400, 460).*

It is also evident from the tone of Lane's own writings that the level of antagonism was sufficiently strong that the AGAC Council itself would have been quite happy to engage in more concerted action to prevent the direct licensing by 3M, if not precluded by law from so doing; and it

*It might also be noted that the 17 writer members who attended the meeting reported in PX 123 (E 459) have almost 5,000 compositions in the ASCAP Performed Works Index (PX 429).

is evident why. In PX 135 (E 482), Lane wrote that "our chief concern is that 3M's signing agreements with individual publishers concerning performing rights is inconsistent", not simply with the "manner of doing business which writers prefer" but also with the manner which *"publishers should prefer"—i.e.,* "to receive performing royalties through performing rights societies." The one major reason for that preference shared by publishers and writers alike is to prevent "the damaging results that affect the entire performing rights structure" (E 459)—*i.e.,* the onslaught of price competition. Mr. Lane's testimony on that subject was obviously guarded to the extent of denying any recollection of any "specific" discussion of that possibility, but he did admit this much:

> "Q Did you consider at all in your discussions at the Guild council whether direct licensing of 3M by publishers might not result in a scramble among publishers to get contracts with 3M and that that might lead to price cutting and competition?
>
> "A I can't say that we did discuss it or didn't, but certainly that kind of thing could exist and we were aware of it. . . .
>
> "Q Did you regard that as an undesirable possibility?
>
> "A Yes, we would have thought of it that way." (Tr. 1149)

Finally, the district court concluded that AGAC and its letter "clearly had no impact on 3M's efforts" (Pet. App. 101a). By "no impact" the court meant it did not lead to publishers' refusals to deal. Of course, AGAC's letter to publishers was sent after nine of them had already refused

to deal and it was thus material only to the second series. But it should be noted, in connection with the issue to which this evidence is actually pertinent, that the AGAC letter was the direct cause of the reconsideration of the 3M proposal by several publishers (E 461, 864, 879); Arrow testified that it was discussed with him by a number of other publishers (Tr. 1443-44); and, on reporting on the results of the letter, Lane wrote, as noted above,

> "We did a very effective job in this direction [the '3M situation'] and the statements which we issued, we think, had great effect in causing publishers to reconsider this question and refrain from participation." (E 482)

ADDENDUM C

The Shenandoah Incident

In October 1961, a group of television stations commenced a proceeding under the ASCAP consent decree, entitled *In the Matter of Shenandoah Valley Broadcasting Inc., et al.*, seeking licenses limited in coverage to locally originated programs. The ASCAP licenses issued to television stations already excluded, by operation of the decree, the television network programs broadcast by the stations. The effect of the *Shenandoah* application, had it been granted, would have been also to exclude programs made by independent packagers (and thus exclude the television station income generated by broadcasts of those programs from the ASCAP license royalty base). [Finkelstein Tr. 3755-56; *see United States* v. *ASCAP (Application of Shenandoah Valley Broadcasting, Inc.)*, 331 F. 2d 117, 121 (2d Cir.), *cert. denied*, 377 U. S. 997 (1964)]

The contention advanced by the stations in support of their application was that the packagers should directly license the music to be used on such programs, which would permit price competition to occur in an area from which it was foreclosed by the blanket license. As such, the proceeding was regarded by music publishers as a potential threat to the preservation of the blanket licensing system. [E 822 (para. 12); Finkelstein Tr. 3756-57; *compare* E 824 (para. 15) *and* Finkelstein D 607-09 *with* Finkelstein Tr. 3762-63]

(It is noteworthy that ASCAP opposed the broadcasters' application not only on the ground that the ASCAP consent decree failed to compel ASCAP to grant that sort of license, but also on the contention that it was then impracticable for the producers of these programs to fill their performance rights requirements by means of direct licensing. Many of the producers involved agreed with the ASCAP position. Whether or not adequate direct-licensing facilities

would have been installed absent a declaration that the blanket system was illegal, the significant point is that this application carried with it some possibility that direct-licensing and thus price competition would be injected into the market.) [Finkelstein Tr. 3757; E 692, 815]

Coincidentally, the proceeding was commenced within a few months of the time that the ASCAP member authorization-of-television-rights agreement was coming up for renewal. Accordingly, many ASCAP members, including Board members, indicated that, unless the stations withdrew their application for the form of license sought in that proceeding, the members would not authorize ASCAP to continue to license their music to television stations at all. It was only after Judge Ryan "instructed [ASCAP's General Counsel] to report to ASCAP that the Court expected ASCAP to deliver those rights to the broadcaster" (Finkelstein D 615), that such authorizations were forthcoming. [E 824 (para. 15); Finkelstein Tr. 3757-58, 3760-61; Finkelstein D 607-09]

At trial, Mr. Finkelstein denied that the members' initial refusal to grant the necessary consents was based on their opposition to the form of license sought by the stations; their concern, Mr. Finkelstein claimed, was solely with the license fees. Thus, on examination by the court:

> "THE COURT: . . . Mr. Finkelstein, was a substantial reason for the failure to secure the eighty per cent up to the time when Judge Ryan suggested that you should get that approval an unwillingness on the part of any substantial number of members to accede to the request of the television stations for the license indicated in Shenandoah?
>
> "A I heard no such observation by any member. The only observation I heard was those people

> who wouldn't sign, we want to see what kind of agreement you propose to come up with this time; how much money; they weren't thinking at all, so far as I know, *they weren't thinking of the kind of agreement but they were thinking very much of the kind of money* they would be getting if they deposited their rights with the society." (Tr. 3762-63) (Emphasis added.)

That testimony, however, was in sharp conflict with the contemporaneous, sworn statement which Mr. Finkelstein submitted in the *Shenandoah* proceeding itself:

> "As a result of Petitioner's unexpected demand for a license covering only a small portion of their local programs [*i.e.*, possibly permitting direct licensing for the rest], a number of ASCAP members delayed the execution of their authorizations of television rights for the 1962-66 period *because of their unwillingness to permit ASCAP to agree to license their catalogues on this basis.*" (E 824 (para. 15)) (Emphasis added.)

In short, the episode provides yet another illustration of ASCAP members' resistance to the prospect of direct licensing; and while the trial testimony of ASCAP's General Counsel attempted to obscure that fact, the inconsistency of the testimony with the contemporaneous affidavit served only to emphasize that the resistance revealed by the incident was sufficiently damaging to warrant that attempt.

ADDENDUM D

Defendants' Admissions and Stipulations Regarding the Present Impracticability of a Television Network Bypass of ASCAP and BMI

1. The Legal and Factual Context.

As discussed in the brief, CBS has maintained that the present barriers to a bypass are sufficient to preclude the attempt, whereas they are entirely cartel-created (music-in-the-can; the present lack of direct-licensing facilities for previously published music and the cartel-inspired disinclination to create them), and thus removable by decree, so that there is no inherent market-functioning disability to a competitive, direct-licensing system.

From defendants' standpoint, however, any attempt to justify the present price-fixing arrangement on market-functioning-necessity grounds was (and is) inconsistent with their bypass contention. Thus, defendants could not rationally assert both (a) that their present common-licensing-agency system was justified on necessity grounds because the market could not function on a direct-licensing basis, while at the same time contending (b) that the market would function so well on a direct-licensing basis that CBS could fill its requirements, without disadvantage, by bypassing the common-licensing agencies.

Until the trial, there was considerable question as to which of those two mutually exclusive contentions defendants would advance. They finally elected to defend on the latter ground; but by that time, they had made so many admissions regarding the present impracticability of a bypass that the contention should have been summarily rejected.

The district court below plainly erred in failing to consider those admissions (which satisfied even the extreme

and erroneous legal standard by which the court tested the putative bypass possibility) and in misconstruing a stipulation of fact that the admissions had prompted. The court of appeals did not refer to either.

2. Direct Admissions.

At the very outset of the suit, BMI admitted the present impracticability of a bypass in its answer to the complaint (JA 68-69, (par. 5)). On July 10, 1970, during the oral argument on BMI's motion for a preliminary injunction, BMI counsel reaffirmed that "seeking direct licenses" from BMI publishers for the purpose of "bypassing the BMI licensing arrangement" "really isn't practical" (JA 159).*

Prior to the institution of this suit, ASCAP representatives frequently conceded the same point in articles, affidavits, testimony in other proceedings, and official literature of the organization (E 411-12 (paras. 12, 14), 444-45 (para. 10), 708 (para. 12); Marks Tr. 2709-10; Finkelstein Tr. 3679-81, 3700-02, 3709-10; Finkelstein D 555). In fact, so immutable was this proposition deemed to be, that Mr. Finkelstein conceded, in testimony before a special subcommittee of the Judiciary Committee of the House of Representatives, that:

> "An organization like ASCAP or BMI or anybody else should not be permitted to combine in great numbers unless there is a necessity for that combination. ASCAP is a voluntary association. By its consent decrees its activities are limited to those things for which the combination is necessary, that is, it can only license the nondramatic performing rights because in all other fields the writer and the publisher can shift for themselves, and so can the user." (Tr. 3679)

*That position is also consistent with the BMI brochure "You and the Music You Use" (E 646) which maintains that dealing with BMI makes it "unnecessary for you [the user] to engage in the *impossible* time- and money-consuming effort of trying to deal directly with the American and foreign composers and publishers whose music you use." (E 649) (Emphasis added.)

Thus, on deposition in this case, Mr. Finkelstein testified:

> "Q Let me ask you this. Is it true that large-scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?
> "A I believe they would.
> "Q Is CTN a large-scale user?
> "A Oh, yes." (D 548-49)

As to the competitive injury that plaintiff would sustain in attempting to license directly:

> "Q Is it also true that the failure of the television network to obtain an ASCAP license would constitute a restriction that would impair the quality of its programs?
> "A Yes, and I would say that today the same thing would apply to the BMI license.
> "Q Is it true that the impairment of the quality of a television network's programs will adversely affect the network's competitive position vis-a-vis other networks?
> ". . . .
> "A Well, I suppose if the quality of a network's program is impaired, that it isn't going to be in as

> good a competitive position with other networks as if its quality is not impaired as related to the other network, that is if the other network's programs don't suffer the same impairment, then it would follow that what you say is correct." (D 577-82)

And, as to the ultimate effect on plaintiff (indeed, in Mr. Finkelstein's view, on the entire system of broadcasting in this country if other networks now joined in attempting to bypass ASCAP):

> "Q If CTN had no ASCAP license at all and persisted in not having an ASCAP license, it, too, in the long run would be injured?
>
> "A I think so. I think so. And if they conspired with NBC not to do it, I think they would both be injured, yes, in the long run. But they would save some immediate dollars. But ultimately it would destroy the American broadcasting system.
>
> "Q How about CTN? Would it destroy CTN?
>
> "A Oh, if the American broadcasting system is destroyed, I suppose CTN would fall with it." (D 575-76)

At trial, Mr. Finkelstein was given every opportunity to rationalize, minimize or otherwise walk away from those points. (Not by ASCAP's counsel, however, for they did not go near any of those statements on direct or redirect, but on cross-examination and examination by the court.) Although Mr. Finkelstein did disclaim a present belief at trial in other points to which he testified on deposition in 1971, he not only refrained from suggesting any reasons why the statements quoted above have become erroneous in

two years, he expressly ratified that testimony (*e.g.*, "it is true"—Tr. 3718*).

Moreover, Mr. Finkelstein's admissions of substantively identical points were expressed repeatedly in affidavits he submitted in opposition to NBC's consent decree application for a limited repertory (or "nucleus") license covering 2,217 songs. For example, in an affidavit sworn to June 25, 1970, Mr. Finkelstein maintained that NBC's need to apply to the court to set fees for the many compositions "not included in the list of 2,217 . . . would impose an impractical burden of continuous applications on both the court and ASCAP" (E 396-97, para. 12). At trial, Mr. Finkelstein not only ratified that statement, but made it clear that the "impractical burden" which would be imposed on the court would be the result of NBC's present inability to directly license those additional requirements:

> "THE WITNESS: . . . . I said that would impose a great burden on the Court and I didn't think that would be workable. I don't think *now* that would be workable . . . .
>
> ". . . . .

---

*As is also true of every statement made by Mr. Finkelstein in testimony, affidavits or other writings, as to which he was examined on deposition or at trial, his ratification of this testimony was conditioned on taking the statements "in their context" (*ibid.; see also, e.g.*, Tr. 3780-81). Moreover, Mr. Finkelstein made a number of assertions in his testimony which are arguably inconsistent with the concessions noted above. Clearly, however, the significant portions of the examination of an adverse party consist of the admissions to which he is drawn, not the assertions consistent with his own self-interest. Even more importantly here, despite the varied testimony which Mr. Finkelstein has made in this case, one may search in vain throughout the many hundreds of pages of examination, on deposition or trial, to find any "context" which alters the plain meaning of the statements quoted above.

"THE COURT: . . . Mr. Finkelstein, was it implied in your belief that a substantial burden would be imposed on the Court that NBC would on many occasions be unable to bring about a direct license of the songs not included in the 2217?

"THE WITNESS: I had in mind that the Court would just reject—that the antitrust laws weren't designed to impose that kind of burden on the Court and it just wouldn't work.

"THE COURT: However many there were?

"THE WITNESS: However many there were and *there would have to be many* because I think that I could envisage—I think I am in a position to project the number of occasions based on past, based on problems that I am aware of. I think I could anticipate that there would be far more applications than the—if this was—if you are going to try to make it work, *than the Court could possibly be confronted with* considering the limited time with cases of this kind." (Tr. 3737-39) (Emphasis added.)

On the same grounds, Mr. Finkelstein asserted in an affidavit sworn to July 10, 1970 (E 405), that "the license NBC requests would be unworkable because it would require that NBC dictate the compositions which might be performed regardless of the performers' desires" (E 411 (para. 12)) and "even to censor compositions already performed on prerecorded broadcasts" (E 412 (par. 14)).

Obviously, the necessity to "dictate" and "censor" would only arise because of the inability of NBC and its program producers to directly license the music they desired to use which did not fall within the "nucleus" license. And, Mr. Finkelstein's admission that that problem was sufficiently large so as to render "unworkable" a form of license covering 2,217 compositions, plus background music libraries, establishes, *a fortiori*, the disadvantage that would now be incurred by a network if it attempted a bypass without any ASCAP license at all.

Precisely that point was brought out on Mr. Finkelstein's deposition in this case:

"Q If CTN had no license at all from ASCAP would it be in the position of having to dictate to the producers of its programs which compositions may be performed and even to censor compositions already performed on prerecorded broadcasts?

"A No. My answer may be due to the form of the question.

"Q You don't like the words 'would have to'?

"A That's right, I don't.

"Q Would they do it?

"A Yes.

"Q Would they have any realistic alternative to doing it, other than, I am excluding, obtaining a license from ASCAP?

"A Having once decided that they would do business that way, everything else would follow.

"Q They would have no realistic alternatives?

"A I would say that they would have made the decision in the first instance and, having made that decision, all these other things follow.

"Q The dictation and the censorship?

"A That's right.

"Q The dictation and the censorship would apply to variety programs?

"A Oh, any program." (D 566-67)

And at trial, Mr. Finkelstein unequivocally ratified that testimony:

> "Q . . . . Is that testimony true, Mr. Finkelstein?
>
> "A I think so." (Tr. 3772)

Indeed, the BMI defendants represented to the district court after the first day of the Finkelstein deposition that the present impracticability of a bypass had already been so clearly established in this case by defendants' admissions that further examination of Mr. Finkelstein or others on the subject would be cumulative and should be foreclosed:

> "5. . . . CBS re-established this proposition early in the day (Finkelstein Deposition Transcript 46-47):
>
> " 'Q Let me ask you this. Is it true that large-scale users of copyrighted musical works would find it wholly impractical to deal with individual copyright owners to fulfill their requirements for music performing rights?
>
> " 'A I believe they would.
>
> " 'Q **Is CTN a large-scale user?**
>
> " 'A Oh, yes.'
>
> "CBS then proceeded to elaborate on this conceded point, asking questions as to the geographical distribution of the ASCAP members (pp. 48-52), the size of the ASCAP repertory (pp. 52-61), the number of compositions added to the repertory each year (including questioning on the 1969 Annual Report **issued by the United States Register of Copyrights**) (pp. 61-67), as well as the following questions which are some of those which consumed the last 70 pages of testimony:
>
> "[Four pages of other Finkelstein admissions are omitted.]
>
> "6. Not once during the deposition did ASCAP attempt to curtail this line of questioning even

> though it had conceded CBS' proposition both in **its Answer and early in the deposition.**
>
> "7. We believe it is clear that if this Court does not fix an early trial and require CBS to confine its discovery to relevant matters and matters which are in dispute, this action could be drawn out indefinitely." (JA 171-76)

3. Stipulations.

On May 25, 1972, CBS and ASCAP entered into a stipulation of facts (E 1), the key language of which for present purposes is set forth in paragraphs 13 and 15. Paragraph 13 provides, *inter alia*:

> "There is a portion of the performance rights to ASCAP music appearing on CTN[*] programs as to which it would be impracticable for CTN or such producers to negotiate for licenses directly with the owners of the performance rights of said music." (E 6)

Paragraph 15 provides:

> "If CTN chose not to have an ASCAP license, the producers of CTN programs did not obtain such licenses, and NBC-TN and ABC-TN had such licenses, to the extent that CTN or the producers of CTN programs did not otherwise obtain the performance rights to the ASCAP music which they desired to use on CTN programming, CTN would be at a competitive disadvantage vis-a-vis NBC-TN and ABC-TN." (E 6)**

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*Defined in the stipulation as the CBS Television Network.

**CBS and BMI had earlier (October 15, 1971) executed a stipulation (E 386) which made any ultimate finding of fact on the bypass question as between CBS and ASCAP binding as between CBS and BMI (E 388-89 (para. 2)). By virtue of that stipulation the CBS-ASCAP stipulation became applicable to BMI—a point with which BMI has never disagreed.

As the product of negotiation, the stipulation is hardly a model of superior draftsmanship; but it was quite clearly misconstrued by the district court below. The court held that since

> "Paragraph 13 does not specify the 'portion' of the compositions in the ASCAP repertory as to which it would be 'impracticable' for CBS to license directly" Pet. App. 48a.

—then

> "Paragraph 13 does not indicate that ASCAP and BMI have admitted the unfeasibility of direct licensing . . . Pet. App. 48a-49a.

and that therefore

> "Paragraph 15 loses the dispositive force which CBS attributes to it." Pet. App. 49a

The district court's initial focus was on the wrong paragraph. The question is not whether Paragraph 13 establishes "the unfeasibility of direct licensing" before Paragraph 15 is read—it is whether Paragraph 15 establishes that proposition given the background facts defined in Paragraph 13.

In short, Paragraph 15 is clearly to the effect that CBS would now suffer a competitive disadvantage vis-a-vis NBC and ABC to *whatever* extent it could not fill its music requirements by direct licensing—and Paragraph 13 affirms that there is *some* extent to which that would happen.

Of course Paragraph 13 does not quantify or "specify" (as the district court noted) the portion of CBS's music requirements that are now unobtainable by direct licensing; but its obvious purport is that *some* portion of its requirements fall in that category—and the obvious result of Paragraph 15 (specifically its conclusion that the fact that

requirements were not fulfilled would result in competitive disadvantage) is to make such quantification unnecessary.*

Although we believe that reading of the stipulation to be the only sensible construction on the face of the language set forth, the facts relating to its execution and ASCAP's pre-trial reliance on it bear out that interpretation beyond peradventure.

The event triggering negotiations of the CBS-ASCAP stipulation was ASCAP's motion, made October 18, 1971, to stay CBS's discovery pending the district court's decision on ASCAP's motion for summary judgment or, alternatively, to limit pre-trial discovery. At that stage of the case, the only deposition taken had been of Herman Finkelstein,

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*It might also be noted that the last sentence of Paragraph 13 reserves to both parties the right to show "reasons" why a portion of CBS' music requirements is unobtainable in practice:

> "[Without limiting the parties' rights to adduce and offer additional proof with respect to any subject, both parties specifically reserve the right to adduce and offer proof regarding the reasons for such impracticability.]" (E 6)

And, at the time, that reservation was important to both sides.

As noted in our brief, one of the issues distilled from the denial of summary judgment was whether the market for the licensing of performance rights to television networks could function on a direct-licensing basis. Presumably, ASCAP retained some interest in taking the negative of that position. By the same token, it was important to CBS to reserve the right to establish that the "reasons" for the impracticability of the direct licensing noted in paragraph 13 were *not* attributable to any inherent inability of the market to function on a direct-licensing basis, but to artificial barriers removable by decree.

ASCAP subsequently contended that the reservation, permitting it to show "reasons" for the stipulated "impracticability," somehow permitted it to prove that the "impracticability," as well as the "competitive disadvantage" stipulated to flow from it (Para. 15 of the stipulation), were *de minimis*. While the district court ultimately agreed with ASCAP's interpretation of the stipulation, it did not predicate that view on the reservation contained in paragraph 13; and there is no conceivable "reason" which ASCAP can offer as an explanation for the phenomenon of the "impracticability" which would dislodge the stipulated fact that the phenomenon would occur (or which would cause it to be *de minimis*, which means legally nonexistent; *Blackstone, Commentaries*, p. 1063 (Chase ed. 1908)).

ASCAP's General Counsel, who had (as noted above) effectively admitted the present impracticability of a bypass attempt, so that logically the only defense left to the ASCAP defendants was market-functioning necessity.

In response to ASCAP's motion, CBS indicated in its supplemental memorandum of November 3, 1971, that it sought further discovery on the bypass question as well as other matters. ASCAP's reply memorandum of November 10, 1971 (consistent with BMI's affidavit discussed above), disputed the need for further such evidence, strongly implying that the contested issue of fact was not bypass disadvantage, but the ability of the market to function on a direct licensing basis:

> "It is not a matter of serious dispute that, if CBS, as a user of music in bulk, had to obtain individual licenses from ASCAP members to satisfy all of its needs for music, that would be a time-consuming, difficult and expensive procedure and might even in some cases for various reasons be impossible. That is precisely one reason why a licensing organization such as ASCAP exists and that is precisely why CBS wants it to continue to exist (even though the logical conclusion to be deduced from CBS's claims of antitrust violations is that ASCAP should be dismembered).
>
> "Why does CBS need discovery to learn what everybody already knows—some ASCAP music, to use CBS's characterization, is 'inaccessible' and some is 'accessible.'" (E 604)

Accordingly, ASCAP suggested that

> ". . . if CBS were to formulate an objective statement of the facts it seeks to prove at a trial, we respectfully submit that the parties could probably stipulate to most or all of the relevant facts." (E 605)

CBS responded on November 12, 1971, proposing procedures for a stipulation of fact process to be completed within the following month (E 825). In a letter of November 18, 1971, ASCAP accepted that proposal without time limits, but agreed to proceed "as expeditiously as possible" (E 829). The court, by letter dated November 18, 1971, approved the parties' attempt to stipulate facts and requested "that the exploration of the feasibility of such a stipulation not be held in abeyance pending my disposition of the motion for summary judgment."

The district court denied ASCAP's motion for summary judgment on January 20, 1972. While stressing that there remained to be tried the factual question of whether the market would function under CBS's proposed relief, the opinion, *noting the admissions of Mr. Finkelstein,* questioned the practicability of the bypass "option";

> "we are doubtful in any event of the practical value of the 'nonexclusive right' under the present system. We are inclined to agree with the court in Schwartz v. Broadcast Music, Inc., 180 F. Supp. 322, 333 (1959). There Judge Weinfeld observed as to the argument that a user always has the 'option' to seek an individual license: 'The nonexclusive right allegedly retained by the plaintiffs [composers and authors] is more apparent than real.'" 337 F. Supp. 394, 401

After repeated court directions to ASCAP to respond to the CBS draft of proposed stipulations (which was submitted to ASCAP on December 8, 1971), and subse-

quent negotiations, the stipulation was finally signed on May 25, 1972.

Having stipulated bypass disadvantage, ASCAP sought to utilize the stipulation as a means of limiting further discovery. On August 25, 1972, CBS moved under Rule 37 to compel ASCAP to answer interrogatories and produce documents relating to, among other points, the reasons for bypass disadvantage (including the transactional problems inherent in the present absence of direct licensing facilities). ASCAP's memorandum of September 27, 1972, in opposition to that motion advanced the following contention:

> "The fact is—indeed, it has been stipulated—that
>
> "'There is a portion of the performance rights to ASCAP music appearing on [CBS] programs as to which it would be impracticable for [CBS] or producers [of CBS programs] to negotiate for licenses directly with the owners of the performance rights of said music.'
>
> "Thus, no one disputes that CBS would have problems if it had to negotiate for all of its performance rights directly. And no one disputes what the nature of the problems might be (people travel, people move, people sometimes will not answer their telephone, etc.).
>
> "In these circumstances, there simply is no good reason for extensive and burdensome document discovery which will then be used to prove the obvious." (JA 334)

In advance of trial, and in its pre-trial memorandum, CBS emphasized, and relied upon, the stipulated fact of bypass disadvantage. ASCAP's counter was that the stipulation left it free to prove that such disadvantage was *de minimis* (and, when CBS noted its disagreement, ASCAP unilaterally announced that the stipulation was at an end). [PX's 988-91; CBS Trial Memorandum, April 25, 1973, pp. 16-18; ASCAP Reply Memorandum, May 7, 1973, pp. 4-6]

On ASCAP's motion to dismiss the complaint at the close of plaintiff's case, CBS again stressed the significance of the stipulation; but ASCAP did not refer to it (Tr. 2379-82).

It was not until the fourth trial day of ASCAP's case (and the first day of the November 1973 session of the trial) that ASCAP requested to be relieved of the stipulation. The sole ground put forth for that relief was that ASCAP had "no intention" to stipulate that bypass disadvantage was any more than *de minimis*. [Tr. 2837-38]

Apart from the implausibility of that assertion and its insufficiency in law, ASCAP's denial of any intention to stipulate to actual, as distinguished from *de minimis*, bypass disadvantage is grievously at odds with the statements made by ASCAP in November 1971 to stay discovery and induce CBS into stipulation negotiations (pp. 12-13, *supra*), and in September 1972, to impose a limitation on CBS's document request (p. 14, *supra*). On both occasions, CBS was seeking information relating to the bypass point; and ASCAP was attempting to foreclose that discovery on the ground that the problems which CBS would encounter in a bypass were undisputed. Indeed, on that second occasion, ASCAP argued that such problems had been stipulated to exist. For ASCAP to have asserted at trial that it only meant to imply that those undisputed problems were *de minimis*, and that it stipulated merely to that effect, was a contention that should have been unworthy of judicial consideration—but represented the final conclusion of the district court.

ADDENDUM E

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The Per-Program Format of a Blanket License

As the court of appeals found, "the per-program license is simply another form of blanket license" (Pet. App. 6a).*

The user receives a license of exactly the same scope as that provided by the standard blanket arrangement: the right to use any, some or all of the music in the ASCAP pool. The difference between the two forms of license lies in the method of payment. Instead of paying a fee for the year, the user pays either ("at the option of ASCAP") a flat dollar fee or percentage of time income for each program using any ASCAP music.**

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*The court of appeals further noted,

> "neither permits the licensee to pay only for those compositions which it actually uses, and the per program license should not be confused with a per use license."

"9. Under the per program license, once there is any use, the amount of use is irrelevant. It does not matter whether one bar or twenty full compositions are performed in each program, the fee remains the same.

The utility of the per program license appears to be limited to broadcasters whose schedule consists predominantly of non-musical programming. In any case, we understand that all three networks and virtually all commercial television stations in the United States hold "annual" blanket licenses.

Under a per use license, on the contrary, the user would pay only for those compositions actually used during the program." Pet. App. 6a-7a.

**The basic format of the per-program license is derived from Paragraph VII(B)(1) of the 1950 consent decree which directs ASCAP

> ". . . to issue to any unlicensed radio or television broadcaster, upon written request, per-program licenses, the fee for which
>
> > (1) in the case of commercial programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster, . . ." (E 131)

Thus, as the court of appeals held, ASCAP's licensing on a per-program basis is price-fixing for the same reason that its licensing on a blanket basis is price-fixing. In both cases, music publishing corporations and writers do not compete on a price basis but sell on prices and terms established by the ASCAP Board.

Also, while a per-program license could be constructed to enable the user to escape paying ASCAP a per-program fee for programs as to which *all* the ASCAP music used has been directly licensed,* it *cannot* be fashioned to permit such an escape for programs as to which *less than all* of the ASCAP music used is directly licensed. In other words, the form of the license imposes an "all-or-nothing" obstacle course to the direct-licensing possibility.

If ASCAP's per-program fee were reduced for each program to take account of the nature and quantity of uses for which the packager, (or, when producing its own programs, CBS) obtained direct licenses, then the per-program fee payable to ASCAP would, of course, be limited to, and vary with, the nature and quantity of the uses for which no such direct licenses had been obtained. And if the fee were made to vary in accordance with the nature and quantity of non-directly-licensed uses, then the ASCAP license providing for such variance would no longer be a per-program license, but a per-use license. That, of course, is the very form of license sought in this case (in the alternative and as a transitional measure—*see* Point IX of our brief).

Furthermore, the per-program license would effectively discourage the use of both ASCAP and BMI music on any single program and is thus patently anti-competitive in this sense alone. Once an ASCAP composition is selected, the incremental cost to the producer of using additional ASCAP compositions would be zero (Steiner Tr. 4444-45). If the producer would like to use a BMI composition as well, under a BMI per-program license, the consequence of so doing would be to double his music expense for the program (and, at per-program rates of four and one-half or even two times the blanket rate, that penalty would obviously be substantial). There might be occasions when the requirements of a particular program would necessitate the payment of this form of tribute. Approximately 70% of CBS's programs now, in fact, use both ASCAP and BMI music (PX's 836-37). But the dis-

It might be noted that the royalty rate of a per-program license will necessarily be higher than the blanket rate. To offer the two licenses at the same rate would simply eliminate the blanket license, since, in that event, the broadcast user would always accept the per-program license, pay nothing on programs using no ASCAP music, and thus automatically reduce its fees (even though its total usage of ASCAP music remained constant).

For that and other reasons, ASCAP has insisted upon, and historically obtained, per-program rates four and one-half times those of the blanket rates (E 5 (para. 11), 285, 354); and ASCAP believes that ratio would be justifiable in relation to a television network (Fagan D 524-29). In fact, ASCAP claims to have lost money on the few per-program licenses it has issued, despite royalty rates of four and one-half times that of the blanket figure (Finkelstein Tr. 3617; Fagan D 467, 526-27).

*The BMI per-program license cannot permit such escape because BMI possesses the exclusive right to license the music in its pool (JA 65, para. 5; E 578 (para. III A), 583 (para. III A), 588 (para. 4(a)).

The only per-program license ever issued by ASCAP in the television field was that offered to television stations in the mid-1950's (initially accepted by several and presently held by none) (E 335; Marks Tr. 2435). In addition to the "all-or-nothing" provision referred to above, it so hedged and conditioned the direct-licensing escape clause with unnecessary restrictions as to make direct-licensing impossible. There is no need here to review those additional restrictions. We agree with the district court below that they could be removed in consent decree proceedings, although ASCAP would predictably oppose any such change (*see* JA 396; Fagan D 530-32) and the proceedings to achieve it would be prolonged and costly. But we may pass that point because the structural elements of the license—restrictions that cannot be removed (*i.e.*, without granting the per-use relief alternatively sought in this suit)—are sufficient in themselves to demonstrate its illegality.

incentive to do so under a per-program system is self-evident. (Fisher Tr. 1712-14; Finkelstein Tr. 3769-70; Nathan Tr. 4011-13, 4018-19; Steiner Tr. 4444-46).

The district court considered neither these structural elements of the per-program license nor their anti-competitive effects. In reaching its principal ruling in this area, that court found:

> (a) that the vast percentage of CBS's entertainment programs did not contain " 'outside' published music" but only music written for the program—and that, for such programs, the music could be licensed directly "without difficulty," the per-program fee escaped, and access to a competitive market obtained (Pet. App. 109a); and
>
> (b) only "a very small portion" of CBS's programs used "outside" published music (for which there was no direct-licensing machinery) so that, for those programs, a per-program license "could be a logical alternative" (*ibid.*).

Presumably, the district court's conclusion was (since no other is apparent) that the anti-competitive impact of the per-program format was without legal significance because it would apply to only a "very small portion" of the CBS programs. If so, the conclusion is wrong in fact and law; and egregiously so in both.

First, while music written for the program is transactionally accessible to packagers, that fact hardly means that the price of such transactions would be at competitive market equilibrium levels. In fact, the "all-or-nothing" provision of the per-program license would ensure just the reverse by creating a price-inflationary effect over and above the price reference point (now $1,000 a feature use) at which ASCAP would be effectively selling to other networks (Fisher Tr. 1717-18, 1723-24). Dr. Fagan, ASCAP's Chief Economist, admitted that price-inflationary

effect in the most explicit terms (D 538-39). And it is evident why.

Under a per-program systems, the producer would be committed in advance to pay ASCAP $5,000 or 9% (or whatever the per-program rate is) for each program using ASCAP music, or double that amount if he wanted to use both ASCAP and BMI compositions. He could not reduce that fee by using less music or by jumping one or several obstacles of the per-program license itself (*i.e.,* by directly licensing one or several songs). He could only attempt to avoid the entire per-program fee; but to do that he would have to license *all* music directly—"outside" published music *and* music written for the program. Each writer and publisher from whom he sought the means to avoid that full $5,000 or 9% fee commitment would therefore be handed artificial leverage (Fisher Tr. 1715-18).

Every publisher and writer approached would obviously be aware of that factor (Fisher Tr. 1717-18, 1723-24; Fagan D 538-39). Each might use it differently, depending upon his assessment of the strength of his composition; but randomized over thousands of transactions a year, that factor would inevitably inflate prices.

Thus, even assuming that packagers would attempt to surmount these hurdles program at a time, and actually succeed in meeting the all-or-nothing requirement for some appreciable portion of their programs, the bargain struck in these transactions would not be at competitive prices (Fisher Tr. 1717-18), but at prices "tampered with" by the combination's restrictive terms. *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150 (1940).

Second, the only way that the court could have found that the vast percentage of CBS's programs use only music

written for the program is by adopting ASCAP's method of computing that percentage—*i.e.*, by counting each of the hundreds of one-minute to five-minute news inserts or children's educational programs as a separate "program" equal in value to a one-hour variety program or a two-hour movie (*see* PX's 838, 840-850; AX's 159, 160(a)-(q), and 287). Moreover, since the ASCAP statistic derived by those means ("perhaps 90-95%" of CBS programs—ASCAP Post-Trial Brief 78) was based on the ASCAP music study (AX 287), it is limited to ASCAP music. Thus, in computing the percentage of programs using published music, ASCAP (and, by adoption, the district court) simply eliminated from that category all programs whose published music consists of BMI compositions.

In short, ASCAP put forth a number based on a statistical stunt and the district court not only adopted the conclusion without recognizing the fallacy, but based its central ruling of law upon it.

Third, that legal conclusion would be wrong even if the underlying arithmetic were sensible (and the price-inflationary effect were assumed, *arguendo,* away). For it would mean that the thousands of transactions, AGAC-writer consents and publisher contacts that the ASCAP music study itself discloses would have to be made in order for CBS or packagers to directly license ASCAP published music (Pet. App. 74a) would be confined to that "very small portion" of CBS programs. All the more obvious, then, would be the fact, already implicit in the district court's position, that at the very minimum, *those* programs could not successfully hurdle the per-program obstacle course.

Thus, if the producer of the Captain Kangaroo show (to use an example cited by the district court) were to accept per-program terms, as the court suggested, he would be effectively barred by its all-or-nothing feature from licens-

ing directly the very music that the court emphasizes is so accessible to him, *i.e.*, the music written specially for the program. He could not, in other words, deal directly even with his own staff writers.

As a matter of law, then, the argument defeats itself. A restraint on competition among sellers need not apply to all of the buyer's purchases (or, in this case, programs) in order to constitute a restraint actionable under Section 1. *United States* v. *Loew's Inc.*, 371 U. S. 38, 47-50 (1962).

In point of fact, whether the use of published music is confined to approximately 10% of all CBS programs as the court suggests (obviously, a not inappreciable number) or 50%, those uses account for the great preponderance of the fees now paid and are, therefore, the most significant in terms of measuring the substantiality of the restraint. Published music now generates between 70% and 80% of the ASCAP credits (*see* AX's 159, 160(a)-(q), 287). That means that between 70% and 80% of the fees CBS pays ASCAP were effectively paid for those uses. If those uses were actually limited to less than 10% of the programs, the per-program format would still preclude any form of price competition as to the majority of CBS's purchases.

To be sure, the district court attempted to deal with the all-or-nothing provision of the per-program license which is the root cause of so many of its antitrust problems. The court's suggestion was that CBS bargain with ASCAP

> "for a license which gave it 'credit' (i.e., a reduced rate) where it had obtained direct licenses for part of the music to be performed on the program in question." Pet. App. 111a.

—or failing that

> "because the decrees enjoin ASCAP and BMI from interfering with the direct licensing of compositions,

> [*] on the face of it, it would appear that CBS could argue in consent decree proceedings, if necessary, that ASCAP and BMI are required to offer a per-program license whose price is reduced to reflect the number of direct licenses obtained for the program." *Ibid.*

Although ambiguous, the suggestion is susceptible of only two interpretations. On its face, it would appear to mean that the per-program license that CBS should obtain is one that gives it a dollar-for-dollar deduction from the per-program fee for the amounts spent in directly licensing music for each program. If so, the suggestion posits a license which, apart from its other legal infirmities, would provide no economic incentive for any direct licensing at all. Why would any packager incur any transactional expenses of direct licensing when he could not reduce the amount he was already committed to pay but, at most, take his (or CBS's) money out of ASCAP's pocket and put it into the publisher's. While that interpretation of the suggestion would make it absurd, the only possible alternative construction actually reconfirms the central error of the district court's opinion.

Under this interpretation, the suggestion would be that CBS is entitled to obtain from ASCAP a form of license under which payments would vary with the nature and quantity of use, and would not have to be paid with respect to directly licensed performances. Indeed, the court's second verbalization of this suggestion (in its "Summary of Findings") seems to bear that interpretation out:

> "[CBS] could negotiate a per-program license with ASCAP and BMI whose fee would reflect the amount of music actually performed and failing

*The BMI decree contains no such provision. The court simply misstated the fact.

> that, it could bring proceedings under the consent decree." Pet. App. 113a.

As discussed above, however, such a license is *not* a per-program license at all, but the per-use license sought (as alternative relief) in this lawsuit. Thus, the form of license the district court proposed as a means of curing all of CBS's problems was the very form of license CBS had demanded in its complaint and the district court refused to grant.

Moreover, if such a license were actually available under the ASCAP decree, as the district court thought, the only ground for obtaining it would be, as the court notes, "because the decree enjoin[s] ASCAP . . . from interfering with the direct licensing of compositions" (Pet. App. 111a). But if the ASCAP system (unremedied by per-use relief) interferes with direct licensing—*i.e.*, with CBS's access to a competitive market—then the ASCAP combination is certainly violating the antitrust laws. And since ASCAP is violating the antitrust laws, then the district court's decision certainly should have come out the other way.

Plainly, there is no rule of antitrust law or general jurisprudence that requires a non-signatory to a consent decree to exhaust supposed consent decree remedies before bringing the sort of independent action explicitly made available to a private party under Section 16 of the Clayton Act.

But the court's suggestion is particularly misconceived in view of the fact that the 1950 consent decree does not compel ASCAP to grant licenses under which fees vary with use (*i.e.*, per-use licenses); and if the consent decree does not compel it, it is not, under the decisions in *United States* v. *ASCAP (Shenandoah Valley Broadcasting, Inc.)*, 331 F. 2d 117 (2d. Cir.), *cert. denied*, 377 U. S. 997 (1964) and *United States* v. *ASCAP (Metromedia, Inc.)*, 341

Addendum E

F. 2d 1003 (2d Cir.), *cert. denied,* 382 U. S. 877 (1965), available in consent decree proceedings. Indeed, what the court of appeals also held in *Shenandoah* was that any commission by ASCAP of antitrust violations was independently actionable irrespective of the decree—a ruling that highlights the error in the district court decision here. For the net effect of that decision was that ASCAP's interference with direct licensing and hence (logically) its violation of Section 1 was remediable by what amounts to per-use terms, which the consent decree does not in fact offer and which the district court refused to grant.